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IN THE DISTRICT COURT, 123rd JUDICIAL DISTRICT OF TEXAS.

No. A2190.

State of Texas,
County of Panola.
To the Honorable Judge of said Court:

Now comes Edwin S. Hull, Joe H. Hull, Fannabel Myers, joined pro forma by her husband, C. T. Myers, and Sadie Hull Biederman, joined pro forma by her husband, Charles E. Biederman, hereinafter called plaintffs, and complaining of Magnolia Petroleum Company, a private corporation, duly incorporated, and Union Producing Company, also a private corporation, duly incorporated, hereinafter called defendants, and respectively allege:

I.

That plaintiffs are the owners of the following described real estate lying and being situated in Panola County, Texas, including the oil, gas and mineral rights thereunder, the plaintiffs Fanabel Myers and Sadie Hull Biederman being the owners only of certain interests in the oil, gas and mineral rights under certain portions of said real estate, which said real estate is described as follows:

1. 160 acres the Nathan Davis Survey, Abstract No. 187.

2. 320 acres the George W. Mallory Survey, Abstract No. 455.

3. 586.6 acres the W. F. Sparks Survey, Abstract No. 869.

4. 1280 acres the F. J. Wise Survey, Abstract No. 842.

5. 160 acres the Amanda Hughes Survey, Abstract No. 317.

6. 320 acres the Thomas Applewhite Survey, Abstract No. 35.

7. 85 acres, the West 85 acres of the J. M. Lambert Survey, Abstract No. 418.

8. 540 acres, being the B. Rush Wallace Survey, Abstract No. 540, except 100 acres in a rectangular form out of the Southwest corner of said survey.

2 9. 640 acres the W. L. Fowler Surveys, Abstract Nos. 212 and 213.

10. 160 acres the J. H. Anderson Survey, Abstract No. 33.

11. 320 acres the S½ of Southern Pacific Railway Survey, Abstract No. 837.

12. 160 acres, the J. W. Gibson Survey, Abstract No. 261.

13. 160 acres the G. W. Johnson Survey, Abstract No. 370.

14. 320 acres, the Thomas Applewhite Survey, Abstract No. 37.

15. 160 acres, the J. I. Gibson Survey, Abstract No. 860. containing 5,371.6 acres, more or less.

II.

Plaintiffs would represent that on the 28th day of October, 1926, E. A. Hull, the father of plaintiffs, executed

and delivered an oil and gas lease upon the above described real estate to Magnolia Petroleum Company, a copy of which lease is attached hereto and marked Exhibit "A" and made a part of this pleading, said lease being for a term of ten years, as therein shown; that thereafter the defendant, Magnolia Petroleum Company, executed and delivered to the defendant, Union Producing Company, some character of an assignment to an interest in said oil and gas lease, and they, the said Magnolia Petroleum Company and the said Union Producing Company, are now claiming some interest in the said real estate by virtue of said oil and gas lease through an arrangement each with the other, the exact character of said arrangement being unknown to the plaintiffs at this time; but plaintiffs allege that both of these defendants are now claiming some right or title in and to the oil, gas and mineral rights under the above described real estate; but plaintiffs allege in truth and fact the defendants do not have any right in and to the oil, gas and mineral rights in, under and on said real estate.

3 III.

Plaintiffs would represent that said oil and gas lease has long since expired; but notwithstanding that the term of said lease has expired, said defendants are now claiming some right, title and interest in and to the mineral rights and oil and gas in and under said land, and plaintffs allege that they believe that the said defendants are asserting said claim by reason of having completed the drilling of two oil and gas wells on said land during the last two years, said wells being known as the E. A. Hull No. 1 and the E. A. Hull No. 2. Plaintiffs allege that it is true that the defendants did complete said two wells and that each of them produced a certain amount of oil and gas, the exact amount being unknown to these plaintiffs, but that after completing said two wells the said defendants have failed and

refused to drill any further, notwithstanding the said two wells completed were a success and showed that there was oil and gas to be found under said land described in said oil and gas lease; and notwithstanding the fact that it is well known to the defendants, and each of them, that the producing wells have both oil and gas, and oil and gas can be found and produced on said land in paying quantities, the said defendants have failed and refused to develop said land and have failed and refused to reasonably develop said land for oil and gas as required under said lease, and have abandoned any right or title that they might have in and to the oil and gas and mineral rights under said land, with the exception of a reasonable amount of acreage surrounding each of said two producing wells already completed. And plaintiffs would allege that a reasonable amount of acreage surrounding each of the said two producing wells is ten acres around each well, and that ten acres would be sufficient and is sufficient to protect any rights the defendants have in and to said E. A. Hull No. 1 and E. A. Hull No. 2. But plaintiffs allege that as to the remaining portion of said oil lease, with the exception of said two ten acre tracts and oil, gas and mineral rights thereunder, said defendants have abandoned same; that they have moved all of the equipment and property belonging to them from said leased premises except that used in producing oil and gas from said two wells, and are not using said property and premises for any purpose whatsoever except only for the purpose of producing oil and gas on said two wells; that the said tract of land covered by said lease is approximately 6,000 acres and now belongs to the plaintiffs in different tracts, and the only one of plaintiffs who is now receiving any revenue is the plaintiff Joe H. Hull; that the other plaintiffs and owners are not and have not received any royalty or revenue whatsoever, and no well of any kind has even been commenced or drilled on any portion of the land belonging to any of the other plaintiffs, and, as stated,

they are not and have not ever received any royalty or revenue of any kind or character whatsoever, and, as stated, the only one receiving any income whatever from the lease is the plaintiff Joe H. Hull, the said two wells having been drilled on that portion belonging to him, the said Joe H. Hull; that the defendants by their action and conduct in regard to the leased premises and the oil, gas and mineral rights thereunder have shown a complete abandonment of all of said lease, together with the oil, gas and mineral rights thereunder, with the exception of the said ten acre tracts surrounding each of said two wells.

IV.

Plaintiffs allege that said oil and gas lease contains an excess of 5,371.6 acres, approximately 6,000, and that the defendants, and each of them, are bound and obligated to make reasonable developments of said lands for oil, gas and mineral rights under the terms of said lease; that, as stated, two wells have been brought in producing oil and gas, and there are wells producing oil and gas on land adjoining these premises, and the geological structures show conclusively that oil and gas can be produced on said premises in paying quantities and oil and gas can be found; but notwithstanding this, the defendants, and each of them, have failed and refused to reasonably and properly develop said land for oil and gas and minerals, and have failed and refused to drill any other wells on said premises with the exception of the two wells described herein; and plaintiffs allege that if the said property is reasonably and properly developed for oil and gas and mineral same would be found in payable quantities and plaintiffs would receive large royalties for their portion under said land; but notwithstanding this the defendants have failed and refused to properly and reasonably and diligently develop said land for oil, gas and minerals, and that by reason of the defendants failure to rea-

sonably develop said land as herein alleged plaintiffs have been damaged in the sum of $200,000.00, for all of which the defendants are bound and liable.

V.

In the alternative, plaintiffs allege that oil and gas can be found under said land in paying quantities; that the geological structures definitely show that oil and gas is under said land and same can be developed and produced in paying quantities; that the said two wells on said premises conclusively show that this land described in said lease contains large quantities and stores underneath same of oil and gas, and that if said land is properly developed by the defendants large quantities of oil and gas can be produced therefrom to the mutual benefit of the plaintiffs and the defendants; and that oil and gas has also been found on lands adjoining said land, and that geological formation and structures are evident to show that oil and gas can be produced from said land in paying quantities; and plaintiffs allege that if wells are drilled on each fifty acre tract of land on said land described in said oil and gas lease, oil and gas can be produced in paying quantities and plaintiffs would receive great dividends and royalties therefrom; and plaintiffs allege that the defendants are bound and liable to reasonably develop said lands for oil and gas, and that though bound and liable to so reasonably develop said land for oil and gas, they have failed and refused to do so, to plaintiffs' great damage and injury; that as heretofore alleged the land described in said lease is owned by plaintiffs in different particulars and in different tracts, and only one of plaintiffs is receiving any royalties whatsoever, the other plaintiffs having never received any royalties, and no wells for oil or gas have ever been commenced on any of the other land belonging to any of the plaintiffs besides Joe H. Hull, and that his land has not been reasonably and properly devel-

oped for the reasons hereinbefore alleged; and plaintiffs allege that a reasonable and proper devolepment requires that a well be drilled upon each fifty acre tract, and that if such a well for oil and gas is drilled on each fifty acre tract oil and gas in paying quantities will be produced to the mutual benefit of both plaintiffs and the defendants; that oil and gas has been found and produced on the land covered by this lease, and oil and gas have been found and produced on tracts of land adjoining this lease, and oil and gas has been found in tremendous paying quantities only a few miles from said tract of land; that the great East Texas field lies in adjoining counties; that competent and highly regarded geologists have rendered their opinion that oil and gas can be produced on this land in paying quantities; that the defendant themselves so recognize this, but notwithstanding such facts, defendants, and each of them, have failed and refused to reasonably and diligently develop said land for oil and gas, and in view of the fact that it is practically impossible to estimate the amount of damages plaintiffs have suffered, they therefore have no adequate remedy at law, and defendants should be required by this Court to reasonably develop all of said land for oil and gas and should be required to drill an oil and gas well at a reasoiable depth upon each fifty acre tract of said land, the drilling of said wells to be outlined by this Court in a drilling program, and that the defendants, and each of them, be ordered and commanded by this Court to reasonably develop said land for oil and gas, and be ordered and commanded by this Court to drill an oil and gas well on at least every fifty acre tract, or in any event to outline a drilling program and order the defendants to be bound thereby, and providing that unless the said wells are drilled as ordered the defendants will forfeit all of their rights, titles and interest in and to all of the oil, gas and minerals under said land, and any and all rights, title and interest that they may have to said land.

7

VI.

Plaintiffs would allege that a reasonable and proper development of said land requires that a well be drilled upon each fifty acre tract, and fifty acres is a reasonable amount of acreage to protect defendants, and that fifty acres is a reasonable amount of acreage for the drilling of a well upon the land described in said lease; that unless this Court do outline such a drilling program these plaintiffs will suffer irreparable damage and injury, and, as stated, they have no adequate remedy at law.

VII.

Plaintiff would allege that in any event this Honorable Court outline a fair and reasonable drilling program which will be fair, just and reasonable to both the plaintiffs and the defendants, and in said program require the defendants to drill wells reasonably necessary to properly develop said land for oil and gas, and direct that the defendants start the commencing of said wells immediately and within a reasonable time, and to continue to drill said wells properly and diligently, and that by the failure to properly perform the drilling program a forfeiture will be had cancelling all rights, title and interests the defendants have in and to said oil and gas and mineral rights under said land.

Wherefore, premises considered, plaintiffs pray that the defendants, and each of them, be cited to appear and answer herein at the next regular term of this Honorable Court, and that upon a final hearing hereof they have a judgment of this Court; (1) cancelling the said oil and gas lease; (2) for the amount of damages they have suffered as hereinbefore alleged; (3) in the alternative, that this Court in its decree map out a drilling program and order the defendants to comply with

said drilling program to reasonably develop said land, ordering them to drill an oil and gas well to a reasonable depth on said land upon each fifty acres thereof; (4) and provide in said decree that failure to carry out said drilling program shall cancel and forfeit this lease; (5) and for such other relief, general and special, in law and in equity, as they may show themselves entitled to; (6) and for all costs of this suit.

HULL AND OLIVER,
Attorneys for Plaintiffs.

9 EXHIBIT "A."

E. A. Hull to Oil & Gas Grant Magnolia Petroleum Company.

Filed Nov. 3, 1926 at 9 o'clock A. M., A. J. Holmes, Jr., Co. Clerk, P. C. T., Recorded Vol. 69, Page 562, Deed Records.

T-4140

The State of Texas,
County of Bexar.

Know All Men By These Presents, that I, E. A. Hull, a widower, whose post office address is San Antonio, 326 Hollywood Ave., Bexar County, State of Texas, hereinafter referred to as grantor (whether one or more), for and in consideration of the sum of Sixteen Thousand One Hundred Fourteen and 80/100 ($16,114.80) Dollars to me paid by Magnolia Petroleum Company, a corporation organized under and by virtue of the laws of the State of Texas, the receipts of which is hereby acknowledged, have Granted, Sold and Conveyed, and do hereby Grant, Sell and Convey, (subject to the royalties hereinafter reserved) unto said Magnolia Petroleum Company, all of the oil, gas

and other minerals in, on or under the tract of land hereinafter described, together with all the other rights herein set out, said tract of land being situated in the County of Panola, State of Texas, and being more particularly described as follows, to-wit:

1. 160 acres the Nathan Davis Survey, Abstract No. 187.

2. 320 acres the George W. Mallory Survey, Abstract No. 455.

3. 586.6 acres the W. F. Sparks Survey, Abstract No. 869.

4. 1280 acres the F. J. Wise Survey, Abstract No. 842.

5. 160 acres the Amanda Hughes Survey, Abstract No. 317.

6. 320 acres the Thomas Applewhite Survey, Abstract No. 35.

7. 85 acres, the West 85 acres of the J. M. Lambert Survey, Abstract No. 418.

8. 540 acres, being the B. Rush Wallace Survey, Abstract No. 540, except 100 acres in a rectangular form out of the Soutwest corner of said survey.

9. 640 acres the W. L. Fowler Surveys, Abstract Nos. 212 and 213.

10. 160 acres the J. H. Anderson Survey, Abstract No. 33.

10 11. 320 acres the S½ of Southern Pacific Railway Company Survey, Abstract No. 837.

12. 160 acres, the J. W. Gibson Survey, Abstract No. 261.

13. 160 acres the G. W. Johnson Survey, Abstract No. 370.

14. 320 acres, the Thomas Applewhite Survey, Abstract No. 37.

15. 160 acres, the J. I. Gibson Survey, Abstract No. 860.

containing 5,371.6 acres, more or less.

To Have and To Hold unto the said Grantee its successors and assigns, said minerals and rights, for the period of ten (10) years from date hereof and for such other and further period of time as any of such minerals are produced from said land; provided, if, prior to the expiration of said period, Grantee shall have begun the drilling of a well or wells on said premises to find oil or gas, then it shall have the right to hold this grant and to *cintune* its drilling operations with reasonable diligence, and also to make as many additional attempts to find oil and gas in paying quantities as it pleases, even though such operations extend beyond the expiration of said ten (10) years term; provided, however, that these operations so extending the grant beyond such ten (10) years term must be prosecuted with reasonable diligence, and the attempts to find oil must be successive in the sense that, until oil or gas be found in paying quantities, nor more than thirty (30) days shall elapse between the cessation or abondonment of work on one well and the beginning of operations for drilling another; and if oil, gas or other minerals be found as a result of such attempts this grant shall continue in force for such further periods of time as any of said minerals are produced from said land.

First.

While this grant is in force, grantee shall have, and grantor hereby grants to said grantee and its successors and assigns, the exclusive right of exploiting and searching on said land for oil, gas and other minerals, and of drilling and operating thereon for and producing same; and to carry out the purposes of this instrument, the following rights are granted—namely, grantee shall have the right of ingress and egress from said land; to produce, save, store and remove said minerals, or any of them, if found, and to conduct all operations and erect and use thereon all such buildings, derricks, tanks, structures, machinery and equipment as may be necessary or proper for said purposes; to have rights of ways on said land for and the right to lay and operate thereon pipe lines to convey oil, gas, water and steam, and to erect and operate telephone and telegraph lines for use in grantee's business conducted thereon, and on other lands operated by it; to repair and remove from said land any of grantee's properties thereon; to
11 have and to use free of charge sufficient water (but not to use water from grantor's wells without grantor's written consent) oil, gas, wood and coal from the premises for light, heat and as fuel for grantee's operations on the premises, also water from grantee's operations on adjoining premises, if there is enough for both purposes; and to have and enjoy such other rights and privileges as are reasonably required for conducting such operations.

Second.

The down cash payment hereinabove recited is paid and accepted in full and final payment of not only the bonus paid for this grant, but is in lieu of any and all delay rentals usually provided for in oil and gas grants and leases, this being intended as an absolute grant of the oil,

gas and other minerals in, or on under the above described lands, with the right, during the term hereof, to enter upon said lands and remove said oil, gas and other minerals, subject to the payment of the royalties herein provided and in accordance with all the terms and provisions of this grant.

Third.

The royalties reserved by the grantor, and which shall be paid by grantee, are:—

(a) On oil, a quantity equal to one-eighth of all the oil produced and saved from said premises, after deducting that used for light, heat and operations on the premises; the same to be delivered at the wells or to the credit of grantor in the pipe lines with which the wells may be connected;

(b) On natural gas at the rate of ⅛th of the market price, at the well payable quarterly, for each well producing gas exclusively, and from which gas is then being used off the land, or sold by grantee, or used for the manufacture of gasoline; the grantor to have the privilege at grantor's risk and expense of making and maintaining the connection and using gas from such well free of charge for one dwelling on the land;

(c) On gas produced from oil wells (including what is usually called casinghead gas), when such gas is used off the land or sold by the grantee or used for the manufacture of gasoline, at the rate of ⅛th of the market price, at the well, for the quantity so used or sold payable quarterly, for the gas from each well while the gas is being so used or sold.

It is expressly understood and agreed that grantee is not under obligation to nor compelled to commence or

drill any well or wells or conduct any character of operations on the land herein described during the term of this grant, save and except such as may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands.

It is agreed that grantee shall have the right to apply a vacuum on any well producing gas to aid in its production.

12 If, as a result of any exploration under this contract, any minerals other than oil or gas shall be found in quantities deemed by the grantee to be paying, then grantee shall have the exclusive right to mine for and produce the same with all incidentals rights, including that of ingress and egress, during the period of this contract, or any extension thereof granted under its terms, and as much longer thereafter as such mineral or minerals may be produced, and shall pay the grantor a royalty of one-eighth of all such minerals so mined and saved, except that the royalty on sulphur, if found, shall be One Dollar ($1.00) per ton for all mined and marketed.

Should the interest owned by grantor in said land prove to be an undivided interest in the tract less than the whole, the royalties to be paid hereunder shall be delivered or paid to the grantor in the proportion only that the undivided interest of the grantor bears to the entire interest or whole. Or, if it should be proven that grantor has no title to a portion of the land no royalties shall be paid from such portion.

Fourth.

No well shall, without grantor's consent, be drilled within two hundred (200) feet of any building now on the land. On grantor's request all pipe lines laid across any

of said land to be tilled shall be placed below plow depth, and grantee shall pay reasonably for any damage done to crops, fences, or other improvements belonging to grantor, by reason of operations hereunder. The use of the surface of the land is hereby granted only so far as may be necessary to conduct said drilling or mining operations hereunder, including the searching for, producing, saving, storing and transporting of said minerals.

Fifth.

Among the other rights granted said grantee and its successors and assigns in consideration of the down cash payment made on delivery hereof, is the right and option which is hereby granted them, to surrender and release, at any time, from the operation of this grant or contract, either all of said land or any part of if designated by grantee, upon paying ten cents (10 cents) per acre additional on the land surrendered and all sums due under the terms of this grant to date of surrender; or, if producing wells have been drilled on said premises, then to surrender and release all of said land except twenty (20) acres for each producing oil well and fifty (50) acres for each producing gas well to ge retained and held subject to the grant and selected by the grantee around the well or wells as near in the shape of a square or rectangle as may be practicable. Upon making such surrender the grantee shall thereopon be released from all further payments, liabilities or obligations as respects the land surrendered.

It is understood, however, that, if grantee should institute any suit in any Court of law or equity to enforce this grant or contract, or any of its terms, or the execution or delivery thereof, or to recover by virtue thereof
13 possession of said land, or any part of it, against or from the grantor his heirs, executors, administrators, successors or assigns, the grantee shall thereby

immediately and concurrently with the filing of such suit abandon and waive the right to exercise this surrender clause and the option to surrender therein granted at any time prior to the expiration of said ten (10) years term, or the completion of a test well on said premises.

Grantor agrees that in consideration of said down cash payment made at delivery hereof, grantor will permit the operations mentioned hereunder; and grantor will permit operations mentioned hereunder; and grantor also expressly renounces and disclaims any right to set up or ask for a forfeiture of this grantor of any part thereof, on account of said right of surrender. In case of partial surrender by grantee the royalties shall be paid by grantee only from the production on the land retained, and all obligations hereunder shall relate only thereto.

Sixth.

The covenants mentioned in this lease, as well as all implied covenants, are not to be understood as conditions, and the breach of one or all of same will not work a forfeiture, abandonment or termination of this lease. Grantee shall not be liable in damages for a breach of any implied obligation or covenant. However, the failure to drill or pay rentals especially provided for in paragraph Second hereof may be and the only grounds for forfeiture of this lease as therein provided.

Title to the minerals vested in grantee under this grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, expressed or implied, of this grant and every part and parcel of the premises described in this grant.

Seventh.

If this grant be surrendered in whole or in part, or expires by its own terms, grantee shall at its cost prepare and cause to be recorded a proper release thereof. Grantee shall notify grantor in person, or by mail, of th_ execution of a release and pay to the grantor anything due hereunder, whereupon all further rights and liabilities under this contract shall cease; provided, that any such due either party that has arisen or accrued out of this contract priot to such surrender or expiration shall be paid.

Eighth.

Grantor hereby warrants and agrees to defend the title to the lands herein described above, and agrees to pay and discharge all liens and taxes (including such proportion of any gross receipts tax against the production from said land while subject to this contract as the royalty paid to the grantor may be of the entire production therefrom), and assessments, charges and incumbrances that are now against, or that may hereafter accrue, be levied, or assessed against the said premises before the same have become delinquent; and, failing so to do, grantee is hereby authorized to advance for grantor (but is *uner* no obligation so to do) the money necessary to pay off and discharge the same, and in such event grantor agrees to repay same with interst at the rate of six per cent per annum from date same is advanced, and grantee shall have a lien upon said premises, together with all the rights of enforcement thereof existing in the former holder, and upon all the royalties accruding hereunder in favor of grantor, to secure the repayment of such advances, and may retain such royalties and apply the same as a credit on said indebtedness until the same is repaid in full.

Ninth.

When drilling or other operations are delayed or interrupted by storm, flood, or other acts of God, by fire, war, rebellion, insurrection, riot, strikes, differences with workment, or failure of carriers to transport or furnish faicilties for transporation or as the result of some order, requisition or necessity of the Government, or as a result of any cause whatsoever beyond the control of the grantee, the time of such delay or interruption shall not be counted against grantee, anything in this event to the contrary notwithstanding.

In case any adverse claim is made to the premises herein described or any cloud upon the title arises or exists during the term of this lease, that upon notice thereof the grantor shall perfect such title and remove such cloud, and the time during which said claim is made or such cloud exists, shall not be counted against the grantee, and the term of said lease shall be extended for the additional period equal to the period in wich said adverse claim or cloud exists.

Tenth,

It is further agreed that all the conditions and terms hereof shall extend to the heirs, executors, legal representatives, successors and assigns of the parties hereto, respectively, and the privilege of assigning in whole or in part is expressly conceded by each party to the other; but it is expressly understood that no change in the ownership of a part of the land, or partition thereof shall impose any additional drilling or other operating obligation on the grantee. Any change of ownership of a part of the land, whether effected by conveyance, will, partition, or otherwise, shall entitle the respective owners only to the royalties arising from the operations and production upon their respective sergregated tracts, unless otherwise provided in the trans-

fer; provided, that the grntee shall not be held responsible for the payment of such royalties to any new owners unless and until the grantee shall be furnished with the instrument of transfer, or a duly certified copy thereof, or in case of no transfer in writing, then with legally sufficient evidence of the change of ownership.

15 Eleventh.

All payments to the grantor, or his successors in title, made under the terms of this contract, shall be made either to grantor in person, or to grantor, or his successors in title, by check of grantee payable to grantor's order, mailed to him at his postoffice addredd, to-wit: 326 Hollywood, San Antonio, Texas, or at the election of grantee, by the check of grantee payable to the order of and mailed to the Texas State Bank & Trust Co., San Antonio, Texas, for the credit of grantor (or such person as grantor may designate), and said Bank, or its successor, is hereby made the agent of grantor, or his successors in title, to receive and distribute said payments. All payments made to grantor or to said Bank for the credit of grantor, or such person as grantor may designate, before actual notice to grantee of the change in ownership, shall be binding on grantor's successors in title. Until notified to the contrary all written notices to be given to grantor may be addressed to grantor by mail at grantor's postoffice address hereinabove stated. The check of grantee made out and amiled in accordance herewith, and at the time required by this contract, shall be considered as payment and legal tender of payment to grantor and his successors in title.

In Witness Whereof, the parties hereto have hereunto set their hands this 28th day of October, 1926, all interlineations and erasures made, and riders attached before signing.

E. H. HULL, Grantor.

The State of Texas,
County of Bexar.

Before me, Louis F. Vogel, Notary Public in and for Bexar County, Texas, on this day personally appeared E. A. Hull known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that he executed the same for the purposes and consideration therein expressed.

Given under my hand and seal of office this 28th day of October, A. D. 1926.

LOUIS F. VOGEL,
Notary Public in and for Bexar
(L. S.) County, Texas.

Recorded Nov. 3, 1926 at 11:45 o'clock A. M., A. J. Holmes, Jr., Co. Clerk, P.C-T.

16 The State of Texas,
County of Panola.

I, A. J. Holmes, Jr., Clerk of the County Court in and for Panola County, Texas, do hereby certify that the foregoing is a true and correct copy of Oil & Gas Grant from E. A. Hull to Magnolia Petroleum Company as the same appears of record in Vol. 69, Page 562 of the Deed Records of Panola County, Texas.

Given under my hand and seal of office at office, in Carthage, Texas this 4th day of May, A. D. 1938.

A. J. HOLMES, JR.,
County Clerk, Panola County,
Texas,
By E. V. SMITH,
(Seal) Deputy.

Filed: Sept. 15, 1938—W. D. Anderson, Dist. Clerk, Panola County, Texas.

17 In the District Court of Panola County in and for the 123rd Judicial District of Texas.

Edwin S. Hull, Et Al
vs. No. A.2190
Magnolia Petroleum Company, Et Al.

Now comes the defendant, Magnolia Petroleum Company, and files this, its Original Answer herein, as follows, to-wit:

1.

This defendant demurs generally to plaintiffs' petition and says that same is wholly insufficient in law or equity to require it to answer, and of this prays the judgment of the Court.

2.

Without waiving the foregoing demurrer, but subject thereto this defendant denies each and every allegation in plaintiffs' petition contained, demands strict proof thereof, and of this prays the judgment of the Court; and this, this defendant will ever pray.

Wherefore, this defendant prays that plaintiffs take nothing by reason of their suit therein, and that it go hence without day and recover its costs.

WALLACE HAWKINS,
CARNEY & CARNEY,
By HUGH CARNEY,
LONG & STRONG,
By J. G. STRONG,
Attorneys for defendant, Magnolia Petroleum Company.

Filed Dec. 31, 1938. W. D. Anderson, District Clerk, Panola County, Texas.

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18 In the District Court of the United States for the Eastern District of Texas, Tyler Division.

Edwin S. Hull, Joe H. Hull, Fanabel Myers, joined pro forma by her husband, C. T. Myers, and Sadie Hull Biederman, joined pro forma by her husband, Charles E. Biederman, Plaintiffs,

vs. Civil No. 45

Magnolia Petroleum Company and Union Producing Company, Defendants.

To the Honorable Judge of said Court:

Now comes Union Producing Company, one of the defendants in the above entitled and numbered cause, and, leave of Court having first been had and obtained, files herewith its amended motions to dismiss the above entitled and numbered cause:

I.

Because said petition fails to state a claim or cause of action upon which relief can be granted for the following reasons, to-wit:

A. Said petition presents a cause of action seeking a judgment for the cancellation of the oil gas and mineral lease sued on because of an alleged abandonment by the defendants of the lands and premises covered by the lease for the purposes contemplated by the lease; and said petition states no cause of action as to the gas rights
19 owned by this defendant for the following reasons:

(1) Said petition on its face, and particularly in Sections II, III, IV and V, show that two wells have been drilled on said premises and that this defendant is in actual occupation of said premises, operating and producing said wells and marketing the proceeds therefrom and paying royalties as required by the contract, which facts, as a matter of law in Texas, conclusively destroy possibility of an abandonment, no abandonment being possible at law in Texas where operations committed, contemplated or required by the applicable oil, gas and mineral lease, are being prosecuted.

(2) For the reason that the allegations in Sections II, III, IV and V show on their faces that the co-defendant Magnolia Petroleum Company is in possession of the lands and premises covered by the suit contract, operating, producing marketing and paying royalties from said wells, shown by said petition to have been drilled and completed, on the leased premises, which operations by the co-defendant Magnolia Petroleum Company would inure to the benefit of this defendant under the terms of the suit contract, and, particularly, but without exclusion, under paragraph Sixth of the oil, gas and mineral lease sued upon, marked Exhibit "A" and made a part of the petition.

(3) For the reason that the oil, gas and mineral lease sued upon and made a part of the petition provides, among other things, substantially as follows in paragraph Sixth thereof:

"Title to the minerals vested in grantee under this grant shall not end or revert to grant or until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, expressed or implied, of this grant and every part and parcel of the premises described in this grant."

and said petition fails to allege any facts which, if established by proof, would constitute a complete, absolute and intentional abandonment by this defendant of said oil, gas and mineral lease and every part and parcel of the leased premises thereby covered, for the purposes of natural gas, expressed or implied, in the grant, but, on the other hand, shows on its face by virtue of the allegations contained in Sections II, III, IV and V of the petition that this defendant has not completely, absolutely and intentionally abandoned all of the purposes, expressed and implied, of the lease as to every part and parcel of the premises covered, but is actively asserting purposes, rights, powers and privileges on the leased premises, expressly and impliedly provided for and granted by virtue of the terms of said lease.

For the further reason that said lease, further in Section Sixth, on its face provides:

21 "The covenants mentioned in this lease, as well as all implied covenants, are not to be understood as conditions, and the breach of one or all of same will not work a forfeiture, abandonment or termination of this lease."

Whereby defendant would show that such petition is insufficient to state any cause of action upon which relief could be had against this defendant as for abandonment of such oil, gas and mineral lease for the natural gas purposes contemplated and permitted thereby.

B. Because the allegations contained in said petition and more particularly, but without exclusion, in Sections IV and V theerof, wherein a cause of action is sought to be stated for damages in the sum of Two Hundred Thousand Dollars ($200,000.00) for alleged failure to reasonably develop under the alleged implied covenant of reasonable

development, do not state a claim upon which relief can be granted for the following reasons:

(1) There can be no implied covenant for reasonable development in the oil, gas and mineral lease sued upon since said lease upon its face by the provisions of Sections Second, Third and Sixth expressly provide for all obligations of this defendant to drill or develop said leased premises for gas, and thereby, as a matter of law, exclude any implications in respect thereof, since that which is expressed excludes that which is implied.

(2) For the further reason that said lease, by paragraph Second, contains and recites the intention
22 of the parties to make an absolute conveyance.

(3) For the further reason that in paragraph Third of such oil, gas and mineral lease, it is among other things, substantially provided:

"It is expressly understood and agreed that grantee is not under obligations to nor compelled to commence or drill any well or wells or conduct any character of operations on the land herein described during the term of this grant, save and except *such as may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands.*"

and said petition wholly fails to show that any wells have been drilled on adjoining lands *which are draining the leased premises;* and for the additional reason that such quoted provision of the lease expressly releases and relieves grantee of all obligations except the obligation to drill as against drainage, which is not shown by the petition to exist. Whereby said petition, on its face, shows as a matter of law that no claim is stated within the provisions of the oil, gas and mineral lease sued upon, en-

titling plaintiffs to any relief as for damages for an alleged failure to reasonably develop, which duty cannot exist under the terms of said lease.

(4) Because said lease, further upon its face, among other things, substantially provides in paragraph Sixth that:

"Grantee shall not be liable in damages for a breach of any implied obligation or covenant."

23 so that the contract relied upon expressly prohibits a recovery of damages for the breach of such an implied obligation to reasonably develop, if such obligation impliedly exists in such suit contract, which is denied; whereby no claim is stated upon which any relief in such respect could be granted.

C. Because the allegations, upon which are sought a decree of specific performance, fail to state a claim upon which relief can be granted, because:

(1) The oil, gas and mineral lease sued upon and attached as an exhibit to the petition and made a part thereof, on its face, fails to state the precise act sought to be enforced so that there is no contract susceptible of a decree of specific performance such as is sought.

(2) For the reason that the decree sought would involve and require the continuous supervision by the Court of a series of acts contemplating and involving personal skill, discretion and judgment, and, since there is no public interest involved in the subject matter of this cause or by virtue of the terms of the suit contract, the Court will not undertake either to write a contract for the parties or to determine when and where this defendant would be required to drill or to supervise the good faith and accuracy

and correctness of its judgment and discretion
24 with respect to various problems that would necessarily arise in connection with the drilling of wells for the productions of natural gas.

(3) For the reason that the suit contract shows upon its face that there is no mutuality in that such contract, by paragraph Fifth, expressly vests the lessee and his assigns with the option to surrender the lease or any portion thereof, at any time, so that the granting of a decree of specific performance would be a vain and useless thing in the face of such contractual provisions.

(4) For the reason that no specific performance could be granted in that the parties to the suit contract, by paragraph Third thereof, have expressly contracted and agreed that the grantee should never be under any obligation to nor compelled to commence or drill any well or wells, or to conduct any character of operations on said lands and premises, save and except only such as are reasonably necessary to protect the leased premises from drainage by wells on adjoining lands, so that the contract expressly negatives and contracts against the obligation of compulsory drilling, under any circumstances, for development purposes only, as is sought by plaintiffs, and said petition nowhere alleges that the leased premises are being
25 drained by wells on adjoining tracts.

(5) For the reason that aside from the provisions of paragraph Sixth of such oil, gas and mineral lease, the proper remedy for breach of the implied covenant, at law in Texas (assuming for the sake of this section of such motion that such obligation should exist, which is denied), is for damages and not by way of specific performance, and such petition nowhere alleges the insolvency of this defendant or its inability to respond in damages, should damages be held to be recoverable.

(6) For the reason that the ownership of the royalty rights by plaintiffs in different capacities and in different tracts, acquired by them since the execution of said oil, gas and mineral lease, as shown by paragraph II of such petition, could not at law have the effect of enlarging or increasing the obligations and duties of this defendant on, in and under such suit contract, so that specific performance upon such grounds would not lie as a matter of law.

(7) For the reason that the ownership of the royalty rights by plaintiffs in different capacities and in different tracts, acquired by them since the execution of said oil, gas and mineral lease, as shown by paragraph II of such petition, could furnish no claim upon which a
26 decree of specific performance could be granted because contrary to the express provisions of the suit contract otherwise contained in paragraph Tenth of such oil, gas and mineral lease, wherein it is, among other things, substantially provided:

"It is further agreed that all the conditions and terms hereof shall extend to the heirs, executors, legal representatives, successors and assigns of the parties hereto, respectively, and the privilege of assigning in whole or in part is expressly conceded by each party to the other; but it is expressly understood that no change of ownership of a part of the land, or partition thereof shall impose any additional drilling or other operating obligation of the grantee. Any change of ownership of a part of the land, whether affected by conveyance, will, partition, or otherwise, shall entitle the respective owners only to the royalties arising from the operations and production upon their respective segregated tracts, unless otherwise provided in the transfer:"

D. That the allegations upon which are predicated a prayer for a decree requiring this defendant to drill wells

for natural gas, as in said petition is more particularly set forth, by a time certain and in a manner certain, as alleged, upon pain of cancellation of said lease, fails to state a cause of action or claim upon which relief can be granted for the following reasons:

(1) For each and all of the reasons set forth herein under subdivision C., the same as though each and all of such reasons were copied and set forth herein seriatim.

(2) For the reason that such relief or decree, if granted, would be contrary to the expressed provisions of
27 the oil, gas and mineral lease sued upon, and more particularly to paragraph Sixth of said lease, wherein, among other things, it is substantially provided:

"The covenants mentioned in this lease, as well as all implied covenants, are not to be understood as conditions, and the breach of one or all of the same will not work a forfeiture, abandonment or termination of this lease. Grantee shall not be liable in damages for a breach of any implied obligation or covenant. However, the failure to drill or pay rentals especially provided for in paragraph Second hereof may be and are the only grounds for forfeiture of this lease as therein provided."

And since paragraph Second of said lease does not provide for any obligation to drill, save only as is referred to by its language to the language in paragraph Third, requiring drilling only when reasonably necessary to protect said leased lands from drainage by wells on adjoining land, no basis exists in said contract permitting the entry of such a decree but the contract, upon its face, expressly prohibits the entry of such a decree.

(3) Because no allegations appear upon the face of said petition which, at law in Texas, would constitute the ex-

traordinary situation in which such decrees are favored by the law of Texas.

II.

Because the petition shows upon its face, when taken in connection with the exhibit oil, gas and mineral
28 lease attached thereto, that the relief sought by the petition cannot be granted because such would be contrary to the express provisions of the lease itself, for each and all of the reasons set forth in paragraph I hereof, the same as though each and all of such reasons were set forth in this numbered paragraph seriatim.

Wherefore, premises considered, defendant prays the judgment of the Court of its above amended motions to dismiss for failure to state a cause of action and that said cause be dismissed, for all costs and for such other orders as the Court may deem proper.

(Signed) W. H. FRANCIS, JR.,
(Signed) THOMAS FLETCHER,
Attorneys for Defendant, Union Producing Company.

Of Counsel
VINSON, ELKINS, WEEMS & FRANCIS,
11th Floor, Eperson Building,
Houston, Texas.

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29 Subject to the foregoing and foregoing amended motions to dismiss for failure to state a cause of action, and only in the event the same be overruled, now comes defendant Union Producing Company and files herewith its motion for bills of particulars, as follows, to-wit:

I.

In Section III of said petition it is alleged that defendants have abandoned any right or title that they might

have in and to the oil, gas and mineral rights under said land, with the exception of certain acreage around each producing well, and thereafter at other divers places in said petition, similar allegations of abandonment are made, whereas the oil, gas and mineral lease attached to said petition, among other things, substantially provides:

"Title to the minerals in grantee under this grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, expressed or implied, of this grant and every part and parcel of the premises described in this grant."

so that this defendant is entitled to know in particularity the facts relied upon by plaintiffs to show a complete, absolute and intentional abandonment, by this defendant of such lease, as is in said petition alleged.

II.

In Section II of said petition it is alleged that the father of plaintiffs, E. A. Hull, executed and delivered the oil, gas and mineral lease, attached as Exhibit A to said petition, and in Section III it is alleged that the lands cov-
30 ered by said lease now belong to the plaintiffs in different tracts and that only one of the plaintiffs is receiving any revenue. Said petition in that respect is vague and indefinite and so general that this defendant is not able to determine the claims and contentions and cause of action alleged and moves that the plaintiffs be required to particularize and state with definiteness:

(a) How they succeeded to the rights of their father. E. A. Hull:

(b) Whether or not they claim that their ownership of the land in different tracts, however, the same may

have been brought about, creates any additional burden or duties upon this defendant, resulting in liability for any of the matters alleged in the petition, and upon what instrument or instruments plaintiffs rely for the establishment of such liability, if they contend there is such a liability;

(c) Upon what facts with respects the division of said lands between plaintiffs, plaintiffs rely to create any causes of action or duties as against this defendant as between tracts now owned by them but originally covered by the oil, gas and mineral lease sued upon.

III.

In Section IV it is alleged that "there are wells producing oil and gas on land adjoining these premises." Defendant moves that plaintiffs be required to furnish par-
31 ticulars as to the name and location of such wells and the tracts upon which they are situated, together with information as to what tract or tracts covered by the oil, gas and mineral lease sued upon, the same adjoin and are contiguous.

IV.

In Section IV it is alleged that the geological structures show conclusively that oil and gas can be produced from the premises in paying quantities. Defendant moves that plaintiffs be required to identify such geological structures and to give the particulars of what such structures show upon which they rely for the conclusion that it shows productivity in paying quantities of oil and gas; and that such geological structures be located and identified in a real extent with respect to each and every tract covered by said oil, gas and mineral lease.

V.

In Section V it is alleged that the geological structures definitely show that oil and gas is under said land and can be developed and produced in paying quantities. Defendant moves that plaintiffs be required to particularize in the manner more particularly set forth by defendant in the preceding paragraph, No. IV hereof.

VI.

In Section V it is alleged that oil and gas has also been found on lands adjoining said land. Defendant
32 moves that plaintiffs be required to particularly identify and describe the wells referred to, their name, number, location and the description of the lands upon which they are situated, together with particulars as to what tract or tracts covered by the oil, gas and mineral lease sued upon such lands are contiguous and adjoining, in whole or in part.

Defendant Union Producing Company also, subject to the motions to dismiss for failure to state a cause of action, herewith moves to strike certain allegations from said petition, as follows, to-wit:

I.

The allegation in Section V that oil and gas have been found in tremendous paying quantities only a few miles from said tract of land, for the reason that such allegation is wholly prejudicial and could not be or become the predicate for the entry of any judgment for any of the relief sought by plaintiffs and could not shed any light upon whether or not this defendant has complied with the contract contained in the oil, gas and mineral lease sued upon.

II.

The allegation in Section V that the "great East Texas filed lies in adjoining counties"; for the reason that the same is prejudicial, impertinent, speculative and
33 can have no connection with any of the matters upon which relief is sought.

III.

The allegation in Section V that "competent and highly regarded geologists have rendered their opinion that oil and gas can be produced on this land in paying quantities" for the reason that such allegation is impertinent, prejudicial, is not an allegation of any fact that can shed any light, even if established, upon the compliance or non-compliance of this defendant with any contractual duty.

Wherefore, premises considered, defendant prays judgment of its amended motions to dismiss for failure to state a cause of action, above set out, and, subject thereto and only in the event the same be overruled, prays judgment of the Court of its motions for bills of particulars and motions to strike, above set out, for all costs and such other orders as the Court may deem proper.

W. H. FRANCIS, JR.,
THOMAS FLETCHER,
Attorneys for Defendant, Union Producing Company.

Of Counsel
VINSON, ELKINS, WEEMS & FRANCIS,
11th Floor, Esperson Building,
Houston, Texas.

34 Copy of the above and foregoing amended motions to dismiss, motion for bills of particulars and

motions to strike was deposited in mail on the 15th day of February, 1939, addressed to Mr. T. P. Hull of the firm of Hull and Oliver, attorneys of record for plaintiffs, addressed to the Bedell Building, San Antonio, Texas.

Copies of these motions on the same date were likewise deposited in mail addressed to Judge Hugh Carney, whose postoffice address is Atlanta, Texas, and Mr. J. G. Strong of the firm of Long & Strong, whose postoffice address is Carthage, Texas, attorneys of record for Magnolia Petroleum Company.

THOMAS FLETCHER.

Filed: Feb. 16, 1939.

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35 (Title Omitted.)

To Said Honorable Court:

Now Comes the defendant, Magnolia Petroleum Company, and adopts the Amended Motions of the defendant, Union Producing Company, to dismiss this cause.

Wherefore, the Magnolia Petroleum Company prays as in said amended motions that this cause be dismissed.

WALLACE HAWKINS,
LONG & STRONG,
CARNEY & CARNEY,
By HUGH CARNEY,
Attorneys for the Defendant, Magnolia Petroleum Company.

PLAINTIFFS' REPLY TO DEFENDANT UNION PRODUCING COMPANY'S AMENDED MOTIONS TO DISMISS.

36 (Title Omitted.)

To the Honorable Judge of Said Court:

With permission of the Court, plaintiffs file this their reply to the defendant Union Producing Company's motions to dismiss, and for such say:

I.

As to Motion A, pages 1 to 4, of the motions to dismiss, plaintffs say that they specifically allege in their original petition that the defendants have shown a complete abandonment of all the lease, together with the oil, gas and mineral rights thereunder, with the exception of the ten acre tracts surrounding each of said two wells, and go further and allege facts which show a complete, absolute and intentional abandonment.

II.

As to Motions C and D, pages 6 to 10, of the motions to dismiss:

(a) The allegations in the plaintiffs' original petition show that the lease was executed on the 28th day of October, 1926, about twelve and one-half years ago,
37 and that the term of the lease as expressed in the first part is for a period of ten years; and the allegations showing that the ten year term of the lease has expired, and that the defendants are seeking to now hold this lease beyond the term of ten years on the ground that they have discovered oil and gas in paying quantities, they therefore cannot remain idle and fail to diligently and rea-

sonably develop the remainder of the six thousand acre tract.

(b) The lease does not contain any agreement which would prohibit this Court from requiring the defendants to reasonably develop this tract of land for oil and gas.

(c) Although the defendants may not have abandoned the lease, but plaintiffs say they have, and although there may not be any absolute grounds for forfeit, still it appearing from the allegations of the petition that the defendants are not reasonably proceeding with the developments required by implied covenants of the lease, and the allegations showing that plaintiffs have no adequate remedy of the law, it is competent for this Court to frame a decree requiring development operations to begin with a time fixed upon pains of forfeiture.

(d) It is provided in paragraph six of the lease that: "However, the failure to drill or pay rentals especially provided for in paragraph Second hereof may be and are the only grounds of forfeiture of this lease as therein provided," which shows conclusively that it was the intention of the parties that this lease could be forfeited for failure to drill.

(e) The terms of this lease having expired more than two years ago, it is incumbent upon the lessees or their assignees to reasonably develop this tract of land for oil and gas. Notwithstanding the lease contains a provision to the effect that lessees would be under no obligation to drill or conduct any character of operations on this land during the Term of This Grant save and except such as
38 may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands, even though lessees were not impliedly bound to reasonably develop the lease during the term thereof, although

undoubtedly they were so bound, still in the present case the time extends beyond the ten year term lease and therefor that clause which the defendant relies upon goes out, because the term as fixed in the lease certainly has reference to the fixed term of ten years.

Plaintiffs state that inasmuch as any additional reply would be in the nature of an argument, they therefore refrain from extending this instrument any longer, but should the Court desire, they would be pleased to prepare and furnish this Honorable Court with a written argument citing authorities to sustain their position; or should the Court desire an oral argument, they would be pleased to so indulge.

Respectfully submitted,
HULL & OLIVER,
By T. P. HULL,
Attorneys for Plaintiffs.

Filed: April 27, 1939.

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39 ORDER OF DISMISSAL.

In the District Court of the United States for the Eastern District of Texas, Tyler Division.

Edwin S. Hull, Joe H. Hull, Fanabel Myers, joined pro forma by her husband, C. T. Myers and Sadie Hull Biederman, joined pro forma by her husband, Charles E. Biederman, Plaintiffs,

vs. Civil Action No. 45

Magnolia Petroleum Company and Union Producing Company, Defendants.

The above cause, having come on for hearing upon a motion to dismiss for failure to state a cause of action here-

tofore filed herein by the removing defendant, Union Producing Company, and said motion having been adopted and joined in by the other defendant, Magnolia Petroleum Company, who had answered prior to removal, and the Court having heard such motion and the argument of counsel thereon and having taken the same under advisement, is of the opinion that said motion to dismiss for failure to state a cause of action upon which relief can be granted is well taken and should be in all things sustained, for the reason that in the oil, gas and mineral lease sued upon and made a part of plaintiffs' petition, the parties have agreed expressly to the terms and conditions of development so that there is no ground for claim of an implied covenant to develop, and for the further reason that under the express terms of the lease, the Court is of the opinion that there is no ground for claiming a forfeiture or abandonment of such lease, particularly in view of the facts admitted by the pleadings that defendants are in possession of the premises and operating and producing oil and gas from the two (2) wells thereon:

40 It is accordingly Ordered and Decreed that the motion to dismiss for failure to state a cause of action upon which relief can be granted heretofore filed herein by Union Producing Company and adopted and concurred in by defendant Magnolia Petroleum Company be and the same is hereby in all things sustained, because of which it is further ordered that this cause be and the same is herewith in all things dismissed.

It is further ordered that all costs be taxed against plaintiffs for which the defendants and the officers of this Court may each severally have their executions.

To which action of the Court in so sustaining such motion to dismiss and in dismissing said cause, plaintiffs, then and there in open Court duly excepted.

(Signed) RANDOLPH BRYANT,
Judge.

Done and dated at Sherman, Texas, January 4, 1940.

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41 NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS.

In the District Court of the United States, Eastern District of Texas, Tyler Division.

Edwin S. Hull, Joe H. Hull, Fanabel Myers, joined pro forma by her husband, C. T. Myers and Sadie Hull Biederman, joined pro forma by her husband, Charles E. Biederman, Plaintiffs,

vs. Civil Action No. 45

Magnolia Petroleum Company and Union Producing Company, Defendants.

Notice is hereby given that Edwin S. Hull, Joe H. Hull, Fanabel Myers and her husband C. T. Myers, and Sadie Hull Biederman and her husband Charles E. Biederman, plaintiffs above named, hereby appeal to the United States Circuit Court of Appeals for the 5th Circuit at New Orleans from the Order entered in this cause on the 4th day of January, 1940, wherein the above entitled cause was dismissed; and the defendants', Magnolia Petroleum Company, Motion to Dismiss for failure to state a cause of action was sustained in said Order, which Order was done and dated at Sherman, Texas, January 4, 1940, and filed January 4, 1940, by Lee Simmons, Clerk of the United

States District Court, at Tyler, said Order being styled Order of Dismissal.

Signed this the 12th day of March, 1940.

T. P. HULL,
Attorney for Appellants, Edwin S. Hull, Joe H. Hull, Fanabal Myers and her husband C. T. Myers, and Sadie Hull Biederman and husband Charles E. Biederman.

Bedell Building,
San Antonio, Texas.

Filed: March 13, 1940.

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42 (Title Omitted.)

Know All Men By These Presents:

That we, Edwin S. Hull, Joe H. Hull, Fanabel Myers and her husband C. T. Myers, and Sadie Hull Biederman and her husband Charles E. Biederman, as principals, and the other subscribers hereto as sureties, are held and firmly bound unto Magnolia Petroleum Company and Union Producing Company in the sum of $250 for the payment of which well and truly to be made, we and each of us do hereby bind ourselves firmly by these presents.

The condition of the foregoing obligation is such that if the said Edwin S. Hull, Joe H. Hull, Fanabel Myers and her husband C. T. Myers, and Sadie Hull Biederman her husband Charles E. Biederman, who have appealed from the Order of Dismissal entered and made in the above entitled and numbered cause on the 4th day of January, 1940, at Sherman, Texas, (which Order of Dismissal

sustained the defendants', Union Producing Company and Magnolia Petroleum Company, Motion to Dismiss for failure to state a cause of action upon which relief can be granted, and this cause was in all things dismissed therein), to the United States Circuit Court of Appeals for the 5th Circuit at New Orleans, shall prosecute their said appeal to effect and answer and pay all costs which may be adjudged against them, and pay all costs if this appeal
43 is dismissed or the judgment affirmed, then this obligation shall be void, otherwise to remain in full force, effect and virtue.

Dated this the 12th day of March, 1940.

EDWIN S. HULL,
JOE H. HULL,
FANABEL MYERS,
C. T. MYERS,
By SADIE HULL BIEDERMAN,
the duly authorized agent of the above four named persons.
SADIE HULL BIEDERMAN,
CHARLES E. BIEDERMAN,
Principals.

ILA S. CHADWICK,
San Antonio, Texas.
GEO. H. GEYER, M. D.,
San Antonio, Texas.
Sureties.

Filed: Mar. 13, 1940.

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44 (Title Omitted.)

It is hereby stipulated by and between the parties to this suit, through their attorneys of record, that this cause was

properly removed from the State Court to the United States District Court, by the defendant Union Producing Company, and that the transcript need not include the following instruments, to-wit:

(1) The petition of the Union Producing Company for removal.

(2) Bond for removal.

(3) Order for removal.

THOMAS FLETCHER,
Attorney of Record for the Union Producing Company.
WALACE HAWKINS,
Attorney of Record, for the Magnolia Petroleum Company.
T. P. HULL,
Attorney of Record for all of the Plaintiffs, Edwin S. Hull, et al.

Filed: Mar. 13, 1940.

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45 (Title Omitted.)

It is hereby stipulated and agreed by and between all of the parties to the above entitled and numbered cause that this suit was filed in the District Court of Panola County, Texas, against the Magnolia Petroleum Company, and the Union Producing Company, and that Magnolia Petroleum Company filed its answer in the said District Court, which answer included a general demurrer to plaintiffs' petition; that thereafter, the cause was removed by the Union Producing Company to the Federal Court for the Eastern District of Texas, at Tyler; that after said cause reached said Court, Union Producing Company made

motions to dismiss upon the general ground of no cause of action stated, in accordance with new Federal rules; that the Magnolia Petroleum Company, having theretofore filed a general demurrer, orally joined in the said motions to dismiss, and said motions were argued both by the Magnolia Petroleum Company, and the Union Producing Company, upon leave of the Court, granted in open Court, that the Magnolia Petroleum Company, by such action, would adopt the motions to dismiss.

46 It is further stipulated and agreed that this stipulation may be placed in the record, and made a part of the transcript on appeal.

HULL & OLIVER,
By HUGH CARNEY,
Attorneys for Plaintiffs.
WALACE HAWKINS,
LONG & STRONG,
CARNEY & CARNEY,
By HUGH CARNEY,
Attorneys for Defendant, Magnolia Petroleum Company.

VINSON, ELKINS, WEEMS & FRANCIS,
THOS. FLETCHER,
Attorneys for Defendant, Union Producing Company.

T. P. HULL,
Attorney of record for Plaintiffs.

Filed: Mar. 27, 1940.

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47 (Title Omitted.)

The clerk will please prepare and incorporate in the transcript of the record upon the Appeal in the above en-

titled and numbered cause the following portions of the record, to-wit:

(1) Caption.

(2) Plaintiffs' Original Petition.

(3) Answer of defendant, Magnolia Petroleum Company.

(4) Amended Motions to Dismiss of defendant, Union Producing Company.

(4a) Plaintiffs' reply to amended motions to dismiss.

(5) The Pleading filed by the Magnolia Petroleum Company adopting the amended motions of the defendant Union Producing Company to dismiss, and wherein the Magnolia Petroleum Company joined in the motion of the defendant Union Producing Company to dismiss.

(6) Order of Dismissal, sustaining defendants' Motions to Dismiss, filed January 4, 1940.

(7) Notice of Appeal.

(8) Appeal Bond.

(9) Stipulation.

(10) This Praecipe.

T. P. HULL,
Attorney for Appellants, Edwin S. Hull, Joe H. Hull, Fanabel Myers and her husband C. T. Myers, and Sadie Hull Biederman and her husband Charles E. Biederman.

620 Bedell Building,
San Antonio, Texas.

48 State of Texas,
County of Bexar.

Before me, the undersigned authority, on this day personally appeared T. P. Hull, well known to me, who after first being duly sworn upon his oath states:

I am the Attorney of Record for the plaintiffs in this cause, and I have prepared and mailed to the Attorneys of Record for the defendants, the Union Producing Company and the Magnolia Petroleum Company, copies of this praecipe.

Signed this the 12th day of March, 1940.

T. P. HULL.

Sworn to and subscribed to before me this the 12th day of March, 1940.

CLAUD CHADWICK,
Notary Public for Bexar
County, Texas.

(Seal)

Filed: Mar. 13, 1940.

CERTIFIED COPY.

D. C. Form No. 30

United States of America,
Eastern District of Texas, ss:

I, LEE SIMMONS, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original record on appeal as called for in the praecipe in the case of Edwin S. Hull, et al vs. Magnolia Petroleum Company, et al, Civil Action No. 45 now remaining among the records of the said Court in my office.

In Testimony Whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at Tyler, Texas, this 9th day of April, A. D. 1940.

LEE SIMMONS,
Clerk,
By SUSIE KERR,
Deputy Clerk.

(Seal)

United States District Court, Eastern District of Texas, Tyler Division. Edwin S. Hull, et al, Appellants, vs. Magnolia Petroleum Company, et al, Appellees. Certified Copy. Record on Appeal.

That thereafter the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

ARGUMENT AND SUBMISSION

Extract from the Minutes of March 24th, 1941

No. 9501

EDWIN S. HULL, et al.,

versus

MAGNOLIA PETROLEUM COMPANY, et al.

On this day this cause was called, and, after argument by T. P. Hull, Esq., for appellants, and Thomas Fletcher, Esq., and Hugh Carney, Esq., for appellees, was submitted to the Court.

OPINION OF THE COURT—Filed April 17, 1941

IN THE

United States Circuit Court of Appeals

FOR THE FIFTH CIRCUIT

No. 9501

EDWIN S. HULL, ET AL.,
Appellants,

versus

MAGNOLIA PETROLEUM COMPANY, ET AL.,
Appellees.

Appeal from the District Court of the United States for the Eastern District of Texas.

(April 17, 1941.)

Before FOSTER, HUTCHESON, and McCORD, Circuit Judges.

HUTCHESON, Circuit Judge: The suit was, by the heirs of the lessor, for cancellation, and damages for non-development, of an oil and gas lease, or in the alternative, for equitable relief against the failure of lessee to develop. The claim was that upon a lease of approximately 6,000 acres requiring reasonable development for oil and gas, defendants had in total breach of their obligation to develop, completed only two producing wells, whereas,

defendants were reasonably obligated to develop the property on a basis of at least one well to each 50 acres.

The defenses on which appellees prevailed below were two-fold. One of these was that a provision of Paragraph (3),[1] of the lease contract, expressly fixes and defines the drilling obligations, and the obligations so fixed are entirely inconsistent with and completely exclude implied covenants for diligent development. The other was, that by Paragraph (6),[2] lessor had agreed with lessees that none of the covenants, expressed or implied were to be understood as conditions; that their breach would not work a forfeiture, abandonment or termination of the lease, and grantee should not be liable in damages for breach of any implied obligation or covenant; and that because of such agreement, appellants were without standing in equity to obtain relief from lessee's holding the property beyond the ten year term without developing it.

Appellants are here insisting; that the first defense completely loses sight of and nullifies the principal apparent purpose of the parties, that the lease be developed for oil and gas, and that under the influence of that view, it wholly misinterprets the paragraph on which it relies and the contract as a whole.

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1 "It is expressly understood and agreed that grantee is not under obligation to nor compelled to commence or drill any well or wells or conduct any character of operations on the land herein described during the term of this grant, save and except such as may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands."

2 "The covenants mentioned in this lease, as well as all implied covenants, are not to be understood as conditions, and the breach of one or all of same will not work a forfeiture, abandonment or termination of this lease. Grantee shall not be liable in damages for a breach of any implied obligation or covenant. However, the failure to drill or pay rentals especially provided for in paragraph Second hereof may be and the only grounds for forfeiture of this lease as therein provided.

"Title to the minerals vested in grantee under this grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee of each and all of the purposes, expressed or implied, of this grant and every part and parcel of the premises described in this grant."

Of the second defense, that the lease validly provides that breaches of its covenants will neither work a forfeiture nor give rise to an action for damages, appellants say that if these provisions are valid, they do not make against, they give emphasis to their claim for equitable relief.

We agree with appellants. Notwithstanding the statements in Paragraph (6) that "title to the minerals vested in grantee under the grant shall not end or revert to grantor until there is a complete, absolute and intentional abandonment by grantee", it is quite clear from the lease[3] as a whole, and it must be read and interpreted as a whole and not in fragments, *Humphries v.*

[3] The State of Texas,
County of Bexar.

Know All Men By These Presents, that I. E. A. Hull, a widower * * * for and in consideration of the sum of Sixteen Thousand One Hundred Fourteen and 80/100 ($16,114.80) Dollars to me paid by Magnolia Petroleum Company, * * * have Granted, Sold and Conveyed, and do hereby Grant, Sell and Convey, (subject to the royalties hereinafter reserved) unto said Magnolia Petroleum Company, all of the oil, gas and other minerals in, on or under the tract of land hereinafter described * * * containing 5,371.6 acres, more or less.

To Have and To Hold unto the said Grantee its successors and assigns, said minerals and rights, for the period of ten (10) years from the date hereof and for such other and further period of time as any of such minerals are produced from said land; provided, if prior to the expiration of said period, Grantee shall have begun the drilling of a well or wells on said premises to find oil or gas, then it shall have the right to hold this grant and to continue its drilling operations with reasonable diligence and also to make as many additional attempts to find oil and gas in paying quantities as it pleases, even though such operations extend beyond the expiration of said ten (10) years term; provided, however, that these operations so extending the grant, beyond such ten (10) years term must be prosecuted with reasonable diligence, and the attempts to find oil must be successive in the sense that, until oil or gas be found in paying quantities, nor more than thirty (30) days shall elapse between the cessation or abandonment of work on one well and the beginning of operations for drilling another; and if oil, gas or other minerals be found as a result of such attempts this grant shall continue in force for such further periods of time as any of said minerals are produced from said land.

First. While this grant is in force, grantee shall have, and grantor hereby grants to said grantee and its successors and assigns, the exclusive right of exploiting and searching on said land for oil, gas and other minerals, and of drilling and operating thereon for and producing same; and to carry out the purposes of this instrument, the following rights are granted—Here follow the provisions usual in similar clauses in oil and gas leases.

Skelley, 83 Fed. (2d) 989, that its principal apparent purpose after the expiration of the ten year term, was the development of the leased premises for oil and gas.

Second. The down cash payment hereinabove recited is paid and accepted in full and final payment of not only the bonus paid for this grant, but is in lieu of any and all delay rentals usually provided for in oil and gas grants and leases, this being intended as an absolute grant of the oil, gas and other minerals in, on or under the above described lands, with the right, during the term hereof, to enter upon said lands and remove said oil, gas and other minerals, subject to the payment of the royalties herein provided and in accordance with all the terms and provisions of this grant.

Third. The royalties reserved by the grantor, and which shall be paid by grantee, are:

(a) On oil, one-eighth (⅛) * * *

(b) On natural gas, one-eighth (⅛) * * *

(c) On gas produced from oil wells (including what is usually called casinghead gas, one-eight (⅛) * * *

It is expressly understood and agreed that grantee is not under obligation to nor compelled to commence or drill any well or wells or conduct any character of operations on the land herein described during the term of this grant, save and except such as may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands. * * *

On minerals other than oil and gas, ⅛, on sulphur, $1.00 a ton; * * * royalties to be paid only on grantor's true interest * * *

Fourth. The usual clause protecting grantor's surface rights * * *

Fifth. Among the other rights granted said grantee and its successors and assigns in consideration of the down cash payment made on delivery hereof, is the right and option which is hereby granted them, to surrender and release, at any time, from the operation of this grant or contract, either all of said land or any part of it designated by grantee, upon paying ten cents (10 cents) per acre additional on the land surrendered and all sums due under the terms of this grant to date of surrender; or, if producing wells have been drilled on said premises, then to surrender and release all of said land except twenty (20) acres for each producing oil well and fifty (50) acres for each producing gas well to be retained and held subject to the grant and selected by the grantee around the well or wells as near in the shape of a square or rectangle as may be practicable. Upon making such surrender the grantee shall thereupon be released from all further payments, liabilities or obligations as respects the land surrendered.

It is understood, however, that, if grantee should institute any suit in any Court of law or equity to enforce this grant or contract, or any of its terms, or the execution or delivery thereof, or to recover by virtue thereof possession of said land, or any part of it, against or from the grantor, his heirs, executors, administrators, successors or assigns, the grantee shall thereby immediately and concurrently with the filing of such suit abandon and waive the right to exercise this surrender clause and the option to surrender therein granted at any time prior to the expiration of said ten (10) years term, or the completion of a test well on said premises.

It is equally clear that under the rule, that the "principal apparent purpose of the parties should be given the greatest weight in determining the meaning to be given the words they used", Contract, Re-Statement, Sec. 236; *Cocke v. Vacuum Oil Co.*, 63 Fed. (2d) 406, appellee's construction of the word "term" in the third paragraph, as applying not only to the ten year term, but any extension thereof, must be rejected and the word must be construed as referring to the fixed or ten year term, and not at all to an extension of it by development. Any other meaning would be absolutely self-contradictory and would completely nullify the provision of the "*habendum*" clause for an extension of the ten year term by drilling, for it would have the lease say in Paragraph (3) that drilling was not required during either the term or its extension and in the second paragraph that diligent drilling was essential to the extension of the term. That the parties understood that the lease and the obligations of the parties under it, were clearly divided into two periods, one, the ten year term and thereafter until oil found, the period of express obligation, the other, the extension of the term after oil found, the period of implied obligation, was made abundantly clear by the provision of the

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Grantor agrees that in consideration of said down cash payment made at delivery hereof, grantor will permit the operations mentioned hereunder; and grantor will permit operations mentioned hereunder; and grantor also expressly renounces and disclaims any right to set up or ask for a forfeiture of this grantor of any part thereof, on account of said right of surrender. In case of partial surrender by grantee the royalties shall be paid by grantee only from the production on the land retained, and all obligations hereunder shall relate only thereto.

Sixth. See Note 2, supra. * * *

Seventh. Usual provisions for release upon surrender. * * *

Eighth. Usual clauses of warrants and for payment of taxes and charges on the property. * * *

Ninth. Usual clause excusing delay in operations beyond grantee's control and providing additional time when necessary to defend title against adverse claims. * * *

Tenth. Usual clause for assignment and providing that change in ownership or partition of the land will not impose additional obligations.

Eleventh. Usual provision for place where payments to grantee are to be made. * * *

sixth paragraph expressly recognizing the existence of implied covenants and making provision for limiting their effect. We therefore hold; that the lease is without express provisions, fixing and defining drilling obligations after oil is found; that drilling thereafter is governed by the covenants implied in the lease; that the cases appellees rely on, such as *Cowden v. Broderick,* 131 Tex. 434; *Gulf Production Co. v. Kishi,* 129 Tex. 487, are wholly without application; and that the cases controlling here are *Waggoner v. Sigler,* 118 Tex. 509; *Cosden v. Scarborough,* 55 Fed. (2d) 634; *Amerado Petroleum Co. v. Doering,* 93 Fed. (2d) 540; *Brewster v. Lanyon Co.,* 140 Fed. 801; *Sauder v. MidContinent,* 292 U. S. 272.[4]

We think it quite plain therefore, that whether the provision in Paragraph (6), that grantee should not be liable in damages for breach of any implied covenant, in view of settled Texas law that such breaches give rise to damage claims, *Waggoner v. Sigler, supra,* is or is not valid,[5] the case, presented, of two wells on the 6,000 acre lease, on a record showing, as this does, that the whole property was proven or at least that there was reasonable grounds to believe that it was oil bearing, presents a clear case for equitable relief directly within *Amerado Petroleum v. Doering,* and *Sauder v. MidContinent Petroleum Corp., supra.*

The judgment is therefore reversed and the cause is remanded with directions to the district judge to frame a decree that the lease shall be terminated, cancelled and held for naught except as to 20 acres around each well already drilled, unless defendants lessees, shall, within a reasonable time to be fixed by the court, commence and

[4] Cf. Summers Oil & Gas, Vol. 3, Secs. 459, 462.

[5] Cf. 17 C. J. S., Sec. 211, P. 563—agreements contrary to public policy; 12 Am. Jur. Sec. 183 and Sovereign v. Boden, L. S. W. (2d) 256, holding invalid agreements fixing the amount of evidence required for recovery; Sovereign v. Martinez, 126 S. W. (2d) 10; Sovereign v. Robinson, 187 S. W. 215; Supreme Ruling v. Hoskins, 171 S. W. 812.

thereafter diligently prosecute drilling operations for the development of the lease for oil and gas.

REVERSED AND REMANDED.

JUDGMENT

Extract from the Minutes of April 17th, 1941

No. 9501

EDWIN S. HULL, et al.,

versus

MAGNOLIA PETROLEUM COMPANY, et al.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Eastern District of Texas, and was argued by counsel;

On consideration whereof, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby, remanded to the said District Court with directions to the District judge to frame a decree that the lease shall be terminated, cancelled and held for naught except as to 20 acres around each well already drilled, unless defendants lessees, shall, within a reasonable time to be fixed by the court, commence and thereafter diligently prosecute drilling operations for the development of the lease for oil and gas;

It is further ordered and adjudged that the appellees, Magnolia Petroleum Company, and another, be condemned, in solido, to pay the costs of this cause in this Court, for which execution may be issued out of the said District Court.

PETITION FOR REHEARING—Filed May 6, 1941

IN THE

United States
Circuit Court of Appeals

For the Fifth Circuit

No. 9501

EDWIN S. HULL, ET AL., *Appellants,*

v.

MAGNOLIA PETROLEUM COMPANY, ET AL, *Appellees*

Appeal from the District Court of the United States For the Eastern District of Texas

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PETITION OF APPELLEES, MAGNOLIA PETROLEUM COMPANY AND UNION PRODUCING COMPANY, FOR REHEARING

NOW COME, Magnolia Petroleum Company and Union Producing Company, Appellees in the above cause, and file and present herewith their petition for rehearing in the above case, and say that the Court, in its opinion and determination of the above appeal handed down on the 17th day of April, 1941, erred in the following particulars:

1.

The Court erred in directing "the district judge to frame a decree that the lease shall be terminated, cancelled, and held for naught except as to 20 acres around each well already drilled, unless defendants lessees, shall, within a reasonable time to be fixed by the court, commence and thereafter diligently prosecute drilling operations for the development of the lease for oil and gas," because the Court was and is without power to determine this cause on the merits and instruct the entry of final judgment since this appeal is only from an order sustaining a motion to dismiss for failure to state a claim upon which relief could be granted, so that the only thing for decision before this Court is the legal sufficiency of plaintiff's petition. If the trial court was wrong in sustaining the motion to dismiss, such determination would only mean that defendants' motions for bills of particulars and to strike should be determined after which they should then file a responsive pleading, so that the case could then go to issue and so to trial. The theory of the motion was that the law of Texas applicable to the grant-contract sued on prevented recovery irrespective of the truth of the factual allegations. Should a trial on the merits become necessary, the contest will be active and vigorous indeed on the facts and conclusions alleged by plaintiffs, with particular contest on whether the facts—apart from the existence of contractual obligation—establish the accrual of an enforceable duty to drill under the contract. The motion to dismiss, of course, admitted the truth of the facts alleged, but only for the purpose of determining the motion.

The District Court for the Northern District of New York had a similar situation before it in the case of U. S. v. Revere Copper & Brass Co. (1939), 28 Fed. Supp. 277. There, the United States sought to recover stamp tax claimed on corporate stock transfers. To the second amended complaint,

the trial court sustained a motion to dismiss for failure to state a cause of action. The Circuit Court of Appeals held there was liability and that it was error to sustain the motion, thus reversing and remanding (100 Fed. (2d) 391). Thereupon, plaintiff moved for judgment for the amount of the tax upon the mandate of the Circuit Court of Appeals, whereas, defendant moved to compel plaintiff to accept the filing of a responsive pleading on the merits. The District Court held that the motion to dismiss and the opinion and judgment of the Circuit Court of Appeals went no further than to test and determine the legal sufficiency of the allegations in the bill, and it having been determined that such allegations did state a cause of action, defendant should file an answer and the merits of the cause determined in the usual manner.

That the entry of final judgment on the merits in such a situation is error has been determined by the Supreme Court in the recent case of POLK CO. v. GLOVER (1938), 305 U.S. 5, 59 S. Ct. 15, 83 Law. Ed. 6. Plaintiffs filed suit to challenge the constitutionality of a Florida statute covering the canning and labeling and sale of citrus fruit juices. Defendants, including the Florida Citrus Commission which intervened, filed answers and also filed motions to dismiss the bill of complaint upon the ground it failed to state a cause of action. A three-judge court was empaneled. On the application for interlocutory injunction the parties filed affidavits setting forth their respective contentions. At the hearing the three-judge court also heard the motions to dismiss for failure to state a cause of action. The injunction was denied, the motion to dismiss the bill was granted, and final judgment was entered accordingly, 22 Fed. Supp. 575. On direct appeal the Supreme Court held that the lower court erred in sustaining the motion, and in a per curiam opinion said:

"We are of the opinion that the District Court erred

in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction. But the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered.

"We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity."

Both the statutes and the constitution preserve to defendants the right of trial on the merits of the facts, and it is not believed that this Honorable Court intended to deprive defendants of such trial in violation of their rights. It is respectfully submitted that if the Court still adheres to its decision, that the action of the trial court in sustaining the motion to dismiss was wrongful, it should nevertheless reform its judgment in the respect herein complained of and in that event simply remand the cause for action by the trial court on the motions for bills of particulars and on the motions to strike, and thereafter, after responsive pleading filed and the cause being at issue, for trial on the merits in the regular manner, in accordance with the decision of the Supreme Court in the case of POLK CO. v. GLOVER, supra.

2.

The Court erred in reversing and remanding the cause with

direction to the district judge to frame and enter a final judgment on the merits in the language set out in the preceding particular without instructing and permitting the consideration and determination of the remaining motions of the defendants for bills of particulars and to strike, and without permitting responsive pleadings by the defendants upon the merits, and without directing and permitting a trial on the facts.

Rule 12(d), FEDERAL RULES OF CIVIL PROCEDURE, provides that defenses set forth in motions "shall be heard and determined *before trial* on application of any party, unless the court orders that the hearing and determination thereof be deferred until the trial." In the case now before the Court, the defendants filed, in the alternative, motions for more definite statement and bills of particulars, and motions to strike.

Rule 12(e) provides "before responding to the pleadings * * * a party may move for a more definite statement or for a bill of particulars."

Rule 12(f) provides "upon motion made by a party *before* responding to a pleading," the party may make a motion to strike.

Rule 12(h) provides "A party waives all defenses and objections which he does not present either by motion as hereinbefore provided for or, *if he has made no motion*, in his answer or reply * * * ."

In The Proceedings of the American Bar Association Institute at Cleveland, 1938, pages 243-4, Professor, now Judge, Charles E. Clark said:

> "You notice that (g) is a provision for consolidation of motions, and that was an attempt to speed things up by requiring in general that you make all your dilatory

motions or motions of form at one time. In order, however, to except this one case involving jurisdictional matters, we had to put in an exception at the end of the rule on that, and so that second long sentence in (g) says that if you make a motion and do not include all the other grounds of motion you then have, you waive them all so far as making them by motion is concerned.

"That is, if you have any that *go to the substance as covered by (h) you still won't waive them*, but the motion grounds are gone and you cannot file another motion, except * * * ."

Again at page 379, Mr. William D. Mitchell said:

"Mr. Hannah, of Washington, asks: 'Is there any way under the rules whereby the plaintiff may test the sufficiency of the answer without losing the right to go to trial if the answer is held legally sufficient? And if so, how could it be done?'

"The answer to that is by motion for judgment on the pleadings. If you started a case in your complaint and the defendant has stated no sufficient defense, you are allowed under these rules to make a motion for judgment on the pleadings. If it is denied, go on and serve notice of trial and proceed in the usual way."

The Supreme Court of the United States has decided a somewhat similar question under the new rules. In MONTGOMERY WARD & COMPANY v. LUTHER M. DUNCAN, 61 S. Ct. R. 189, December 9, 1940, in construing Rule 50(b), the court held that where a motion for judgment non obstante veredicto with alternative motion for new trial was made and the trial court erroneously sustained the first motion without passing on the alternative motion, the Circuit Court of Appeals in reversing the case should not decide it on it merits but that the case should be remanded with leave to the trial court to dispose of the motion for a new trial.

Even where the trial court has overruled the motion of the defendant to dismiss because of the insufficiency of plaintiff's

petition and grants an interlocutory injunction, the Supreme Court directs that other matters raised, including the matter of motion to strike, should be disposed of upon final hearing in the trial court. GIBBS, ET AL., v. BUCK, ET AL., 307 U.S. 66, 78, 59 S. Ct. 725, 83 L. Ed. 1111. Certainly a defendant whose motion to dismiss was sustained in the trial court should not be put in a worse position.

Where the Circuit Court of Appeals reverses the judgment of the District Court in sustaining a motion to dismiss, the proper order is to remand "for further proceedings," SIEROCINSKI v. E. I. DUPONT DE NEMOURS & Co., 103 F. (2d) 843; "or for further proceedings not inconsistent with this opinion," LEIMER v. STATE MUTUAL LIFE ASSURANCE CO. OF WORCESTER, MASS., 108 F. (2d) 302.

3.

The Court erred in holding that the grant "is without express provisions, fixing and defining drilling operations after oil is found; that drilling thereafter is governed by the covenants implied in the lease;" because the provisions of Paragraph Third being on the *subject* of development prevent the implication of any provisions on the subject of development, in accordance with the decisions of the Supreme Court of Texas in:

Gulf Production Company v. Kishi, 129 Tex. 487, 103 S.W. (2d) 965;
Cowden v. Broderick & Calvert, 131 Tex. 434, 114 S.W. (2d) 1166;
Waggoner Estate v. Sigler Oil Company, 118 Tex. 509, 19 S.W. (2d) 27;
Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W. (2d) 1039;
Ralph, et al., v. Magnolia Petroleum Company, et al. (writ of error refused), 95 S.W. (2d) 222;

and the approval by that Court through refusal or dismissal of application for writ of error of the holdings of Texas Courts of Civil Appeals in:

> O'Neill v. Sun Oil Co., 123 S.W. 172;
> Lucy v. Dedman, 21 S.W. (2d) 546;

and which decisions by the Supreme Court of Texas control this Honorable Court in accordance with the decision of the Supreme Court of the United States in ERIE RAILROAD CO. v. TOMPKINS, 304 U.S. 64, 58 S. Ct. 817, 82 Law. Ed. 1188.

In the KISHI case the Supreme Court of Texas says:

> "* * *; in other words, that these two paragraphs contain the agreements of the parties upon the subject of development and the subject of diligence of development. This being true, there is no necessity for the implication of a covenant for development with reasonable diligence. To imply such a covenant would be to make an agreement for the parties upon a subject about which they have in their written contracts expressly agreed."

This is not so because the content of the express language is affirmative or negative. It is so because the "parties expressly stipulated upon the subject of development." The content of the agreement is wholly within the choice of the contracting parties. The courts are not at liberty to supervise the wisdom or what they may conceive to be the equity of the provisions. Courts may not as equity declare the non-enforcement of express provisions against development because they find the dominant purpose was receipt of royalties which would result from production because so to do would be the making of an involuntary contract for the parties, which courts are powerless to do. This Honorable Court has nevertheless by its judgment done just that. Neither the KISHI nor other cases so hold because *some* development is required—nor is that

the test. As JUDGE SMEDLEY says if the parties expressly contract upon the subject of development (irrespective of whether that provision may require or relieve against drilling in whole or in part) that controls, and the courts may not under the guise of construction or implication or subservience of the so-called dominant purpose adjudge otherwise. We respectfully submit that the judgment of this Honorable Court is in the face of the express provisions of the contract, and contrary to the holdings of the Supreme Court of Texas which it is required to follow. There was in this lease an express agreement upon the subject of development which prevents the existence of an implied covenant. We also respectfully point out that the plaintiff's petition contains no pleading of fraud, accident or mistake respecting such provisions, nor do plaintiffs make any effort to reform the grant either by way of cancellation or elimination of such clause, or to amend the clause to make it conform to the holding of this Honorable Court.

This Honorable Court proceeds on the premise that because "the principal apparent purpose of the parties" is "that the lease be developed for oil and gas," an implied covenant for development always exists. This is the same misconception appellees had in the KISHI case. There the Court said:

> "The true rule is that the implied covenant arises only out of necessity and in the absence of an express stipulation with respect to a development of the leased premises."

It is only when there is complete silence upon the subject of development after production obtained that an implication can be considered. Its existence is not to be assumed.

In the light of that principle, Paragraph Third becomes additionally significant. It will be noted that the paragraph provides in full detail for the payment to grantor of royalties

reserved, in the midst of which appears the provisions stipulating against compulsory or obligatory drilling save for production against drainage—followed by other royalty provisions. Its physical location itself refutes the holding. Obviously, royalties would be payable only after production. This is so fundamental that the act of the parties in placing the provisions in the middle of the royalty provisions itself conclusively shows that the parties contemplated that such provisions could only be applicable after production obtained. If, as the Court holds, the parties understood the "lease" and its obligations were divided "into two periods, one, the ten year term and thereafter *until* oil found, the period of express obligation," and if, as the Court further holds, this provision in Paragraph Third expired with such ten year period, it seems more than strange that the parties should have anchored that provision securely in the middle of provisions that could only refer to the "second" term. It is far more reasonable and consonant with the grant that this provision means what the situation compels; that it applies and refers to operations which would have the effect, after production, to produce the reserved royalties. In fact the holding of the Court has effect to destroy and completely delete the provision. For a most substantial consideration the grantee purchased the estate—fully paid up for the period of ten years. Under no conceivable ground could it be said that the grantee could be under any duty during such ten years to drill for development. There can be no difficulty about the bond. To what then could it apply? There is only left the time between the end of the ten year period and production obtained, if, as the Court holds "the extension of the term after oil found" is "the period of implied obligation." Clearly that time, as the Court holds, is governed by the provisions of the habendum clause. This Court then must hold that the provisions of Paragraph Third can only apply to the time between the end of the ten year period and oil found. In other words, the

holding is that Paragraph Third releases necessity of drilling which by the habendum clause is essential to extension of the grant beyond the ten year period. That is to say, the provision is meaningless and applies to nothing.

We respectfully submit that the contract of the parties should be exonerated and upheld, and that its plain and unambiguous provisions preserved, as the parties obviously intended. We believe the holding to be erroneous.

4.

The Court erred in holding that the parties understood that the grant was divided into two terms, one for ten years and till oil be found, governed by express provisions, the other the "extension" after oil found, governed by implied obligation, and that such was made "abundantly clear" by Paragraph Sixth expressly recognizing the existence of implied covenants, for the following reasons, to-wit:

(a) Because the existence of implied covenants, if any, in such grant could not point an understanding of the parties as to the existence of two terms. We are not aware of any decision dealing with an implied covenant governing the existence or splitting of terms. It is submitted that all implied covenants or terms in oil, gas or mineral leases deal with the existence, nature and quality of duties and their performance by the lessee. The existence of a duty or the quality of care and diligence necessary to be taken in its performance, do not measure and can have no bearing on the identity of the "term" of this grant or any oil, gas and mineral lease.

(b) Because the provisions of Paragraph Sixth are not inconsistent with the provisions of Paragraph Third or the validity of Appellees' contentions in that such provisions of Sixth Paragraph reasonably refer to other matters. Paragraph Third expressly excepts therefrom such operations as may be nec-

essary to protect the land from drainage from producing wells on adjoining lands. Therefore, there are in the grant implied provisions relating to the diligence and promptness in drilling to protect against drainage—together with the usual implications to use due care, skill and efficiency, etc., in drilling. Furthermore, there is the implied agreement that grantee will conduct all operations in due care and in the most efficient and workmanlike manner. It is also widely contended that there are in oil, gas and mineral leases implications that due care will be taken to protect and conserve the product, and to market it expeditiously and to the best available manner. Likewise, there are implications that operations will not be conducted in disregard of surface and surface improvements. It is felt that the Sixth Paragraph certainly cannot be said to make abundantly clear that the parties intended two terms, or that the parties so understood. There does not appear to exist any basis to single out of the word "implied" in that Paragraph a reference to "development" at odds with the express language of Third Paragraph particularly when it is obvious that "implied covenants" as used in Sixth Paragraph reasonably related to other matter. The limitation could only refer to such other matter, for, compulsory and obligatory development having been expressly denied, no limitation thereabout was necessary. However, the language of the limitation being in the disjunctive would be sufficient to cover any activity undertaken whether by express or implied covenant, hence the inference with which the limitation is clothed by the holding does not seem justified by the fact of the limitation.

(c) Because under the holding of the Supreme Court in the case of ERIE RAILROAD CO. v. TOMPKINS, 304 U.S. 64, 58 S. Ct. 817, 82 Law. Ed. 1188, this Honorable Court is required to follow the holding of the Supreme Court of Texas in the case of GULF PRODUCTION COMPANY v. KISHI, 129 Tex. 487,

103 S.W. (2d) 965, wherein the Supreme Court expressly repudiated the effort to divide an oil, gas and mineral lease into two periods, one, to be governed by express obligations, the other, by implied obligations. In this case the Supreme Court of Texas said:

> "Appellees' second proposition argues, in an effort to create a field for the operation of an implied covenant, that the express stipulations as to drilling wells do not state fully the duty of the lessee to develop but relate exclusively to development to be done within a specified period less than the entire term, and that there is an implied covenant for reasonable development during the remainder of the period for which the leases may endure. We find nothing in the leases suggesting that the express stipulations do not state fully the lessee's duty as to development. They specify the number of wells that must be drilled in the development of the property. The provisions that each well must be commenced within sixty or ninety days from the completion of the last prior well were intended to accomplish the diligent drilling of the wells required and not to divide the terms of the leases into separate periods of development.
>
> "Appellees' third proposition, that the stipulations for the drilling of the wells are conditions precedent to the acquisition by the lessee of new and enlarged estates as to which there are implied covenants for reasonable development, is untenable for the reason that it presents an erroneous conception of the nature of the estate created by the leases. It is settled in this state that an oil and gas lease, like those here under consideration, operates presently to invest the lessee with a determinable fee in the oil and gas in place. Texas Company v. Davis, 113 Tex. 321, 254 S.W. 304, 255 S.W. 601; Stephens County v. Mid-Kansas Oil & Gas Company, 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; W. T. Waggoner Estate v. Sigler Oil Company, 118 Tex. 509, 19 S.W. (2d) 27; Sheffield v. Hogg, 124 Tex. 290, 77 S.W. (2d) 1021; 80 S.W. (2d) 741. The express provisions of the leases that the rights or

estates of the lessee shall terminate on its failure to drill the wells are limitations upon the duration of the estates created by the leases. They are not conditions precedent to the acquisition of new or different estates. They are special limitations, by which, upon the happening of the contingency, the estate may come to an end before the regular end of the term. Tiffany's Real Property (2d ed.), Para. 59(b), p. 208; W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 519, 19 S.W. (2d) 27. No new estates arose or vested upon the completion of the wells stipulated to be drilled in the third paragraph of the first lease and in the fourteenth paragraph of the second lease. The drilling of the wells freed the estates created by the leases from the limitations prescribed in those paragraphs."

BOUVIER'S LAW DICTIONARY, UNABRIDGED (Rawle's Third Revision), defines "term" as follows:

> "The limitation of an estate: as a term for years, and the like. The word *term* does not merely signify the time specified in the lease, but the estate, also, and interest that passes by that lease: and therefore the *term* may expire during the continuance of the time: as by surrender, forfeiture, and the like."
>
> " 'Term' signifies not only the limitation of time, or period granted to the lessee for occupation of the premises, but it also includes the estate and interest in the land that pass during such period." (BARNES v. STANDARD OIL CO. OF CAL. (Wash.), 9 Pac. (2d) 1095, 1099.

Indeed, the Supreme Court of Texas, in addition to its holding in the KISHI case, earlier fixed the question of what the "term" of a lease is in DAVIS v. VIDAL, 105 Tex. 244, 151 S.W. 290. The question was whether an instrument was an assignment of a lease, or was merely a subleasing. It became necessary, therefore, to determine precisely what the *term* of the lease was, for if the full term were transferred it was called an assignment. Said JUDGE DIBRELL:

"It will be observed that, in stating the general rule as to what constitutes an assignment of a lease as distinguished from a sublease, the requirement is that the instrument must convey the whole *term*, leaving no interest or reversionary interest in the grantor.

"By the word 'term,' as used in the statement of this principle of law, is meant something more than the mere *time* for which the lease is given, and the instrument must convey not only the entire time for which the lease runs, but the entire estate or interest conveyed by the lease. Mr. Blackstone in his Commentaries (book 2, p. 144), in commenting on the significance of the word 'term,' when used in leases, says: 'Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by the lease; and therefore the *term* may expire, during the continuance of the *time*, as by surrender, forfeiture, and the like.' The meaning of the word 'term,' as defined by Blackstone above, was adopted by the Supreme Court of Massachusetts in the case of Dunlap v. Bullard, 131 Mass. 162, and by a number of text-writers on the subject of assignments and subleases." (Italics by the Court.)

The principle is the same as to this grant or an oil, gas and mineral lease. The rule finds universal application in the United States. See:

Sanderson v. City of Scranton, 105 Pac. 469, 472;
Johnson v. Moxley (Ala.), 113 So. 651, 654;
Chicago Attachment Co. v. Davis Sewing Machine Co. (Ill.), 25 N.E. 669, 670;
Curry v. Bacharach Quality Shops, 117 Atl. 435, 438, 271 Pa. 364;
Hurd v. Whitsett, 4 Colo. 77, 84;
Gay Mfg. Co. v. Hobbs, 38 S.E. 26, 128 N.C. 46;
Austin v. Huntsville Coal & Mining Co., 72 Mo. 535, 37 Am. Rep. 446;
Delaware L. & W. R. Co. v. Sanderson, 1 Atl. 394, 109 Pa. 583;

Weander v. Claussen Brewing Ass'n, 42 Wash. 226, 84 Pac. 735, 736;
Taylor v. Terry, 71 Cal. 46, 11 Pac. 813;
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Rooney v. City of Omaha, 105 Neb. 447, 181 N.W. 143;
City Trust Co. of Newark v. Cohen (Court of Errors and Appeals, N.J., 1921), 112 Atl. 825, 95 N.J.L. 425;
Summers On Oil and Gas (Perm. Ed.), pages 103 to 173.

The KISHI case points out that an oil, gas and mineral lease invests lessee with a determinable fee which being true, the same could only be one estate or title for one duration, to-wit, until it should determine in accordance with the terms or events stipulated. It cannot reasonably be said that the quality of that title or estate could be in any manner changed, affected, modified, restricted or enlarged during its continuance. The "splitting" argument is ingenious but we submit not sound because the foundations of such an estate and the boundaries of its continuance are too firmly embedded in Texas jurisprudence. It simply does not ring true to the concept of a determinable fee or its duration.

(d) Because, if the holding be correct, then of necessity all of the provisions of the grant—including the royalty provision—must of necessity expire with the "first" term, and with the provisions in Paragraph Third because if the intent of the parties was that Paragraph Third should so expire, which is denied, the same intent would inhere in all other provisions and the distressing result that there were no provisions left to guide and govern the parties would inevitably result from such holding. There is no language that points out that any one or more provisions should not so expire. By whatever yardstick this Honorable Court discerns the demise of Paragraph Third at the end of the "first" term, it must also

foretell the desuetude of all others—for all are alike, and none provide for renewal, expressly, during the "second" term, nor do any of them exhibit internally greater power of vitality.

It is respectfully submitted that the holding is error.

5.

The Court erred in holding that the word "term" as used in the Third Paragraph of the grant or as used elsewhere in said grant "must be construed as referring to the fixed or ten year term, and not at all to an extension of it by development," because:

(a) Such holding is contrary to the terms of the grant.

(b) The grant conveys a base or determinable fee so that the term thereof can only be the bounds or limits of the estate conveyed, and any period of time short of the bounds or limits of the estate, however expressed, cannot be said to be the term. In other words, the "term" does not merely signify the time specified in the instrument, but the estate also, and the interest passing by that instrument for the "term" may expire during the continuance of the time as under the clause permitting surrender and release.

(c) The unmodified words "term of this grant" used in the oil and gas lease include the entire duration of the rights under the lease. The context as a whole clearly shows the meaning of the word "term." The words "during the term of this grant" used in Paragraph Third of the oil and gas lease included the duration of the grant and not simply the primary term because elsewhere in the lease the expression is used "ten (10) years term" except in Paragraph Second the expression is used "with the right, during the term thereof, to enter upon said lands and remove said oil, gas and other minerals," which said unmodified word "term" clearly included the right to re-

move minerals during the primary period of ten years and the period thereafter during which the life of the lease was perpetuated by production.

(d) Such holding constitutes an involuntary making of a contract for the parties which they did not make, and which this Honorable Court is without power to do.

(e) Such holding reforms and amends such grant, there being no pleading thereto, so as to render some clauses thereof applicable only for a period of ten years, whereas the instrument itself does not so specify.

6.

The Court erred in holding that any other meaning to the word term "would completely nullify the provision of the '*habendum*' clause for an extension of the ten year term by drilling, for it would have the lease say in Paragraph (3) that drilling was not required during either the term or its extension and in the second paragraph that diligent drilling was essential to the extension of the term," for the following reasons, to-wit:

(a) Because the provisions of the habendum clause plainly do not apply to development but solely and only to steps and actions to extend the period of the estate granted through production or efforts to obtain it, and are wholly permissive and optional, and in nowise obligatory. The optional choice to elect the doing of a permissive act can have no logical or legal relation to the doing of a required act. The grant would delimit by its express terms, if, at the end of the ten year period, no minerals were being produced unless the grantee should avail itself of the stipulated permission to extend the term by drilling. Such permission is wholly in favor of the grantee and for his protection and is the basis for its inclusion in the grant. Failure to exercise it breached no duty owed

to the grantor, did not produce a default against the lessee, and did not arm the grantor with any right he could enforce against the grantee for damages or otherwise. The stipulations against obligatory development operations in Paragraph Third could in no manner relieve grantee from a duty in the habendum clause, because the habendum clause provided no duties. One needs no release against a non-existent duty. There is then no conflict between the habendum clause and Paragraph Third under Appellees' contentions, rather the harmony of the terms of the grant is preserved. But, it is submitted, the holding of the Court could produce irreconcilable conflict because it would produce obligatory duties not provided for and would change the subject matter of the provisions of the habendum clause in a manner entirely foreign to what the parties had in contemplation. That drilling might be essential (to the grantee) to extend the term beyond ten years does not make against release from obligatory development operations. It would be essential to grantee but not a duty stipulated to be performed. Paragraph Third means just what it says, that the parties agree that the grantee shall never be compelled or obligated to drill. The grantee certainly was not compelled or obligated to drill by the habendum clause. It is submitted there is and can be no conflict from Appellees' position on the grant.

(b) Because the Court is mistaken as to its holding on the "Second" Paragraph, since the grant shows such Paragraph does not purport to provide that diligent drilling was essential to the extension of the term.

7.

The Court erred in holding that the instrument sued on is an oil, gas and mineral lease, because the same shows on its face to be a grant or conveyance absolutely.

8.

The Court erred in discussing or suggesting doubt of the validity of certain provisions in Paragraph Sixth, because there was and is no issue in this cause touching the validity of such provisions.

9.

The Court erred in instructing the District Court to enter judgment compelling drilling, because such a decree of specific performance is not proper in this situation, since

(1) the precise act sought to be enforced is not fully, clearly and definitely described in the contract;

(2) there is a want of mutuality in that the grant sued upon expressly gives to grantee, its successors or assigns, the right or option to surrender the grant in whole or in part at any time.

10.

It is assumed that the Court sustained the positions of the Appellees as set forth in Appellees' brief upon the question of (a) abandonment, and (b) the extension of duties with respect to the payment of royalties through subdivisions and partitions subsequent to the date of the grant, though such matters were not mentioned in the opinion. If the Court intended to hold that there was an abandonment or that the partition and subdivision by plaintiffs was the basis for requiring drilling operations in order to produce royalties, then, in that event, defendants say:

(a) That the Court erred in not holding that there can be no abandonment of the grant of the oil, gas and other minerals

in this cause, by defendants, as a matter of law, since the petition shows upon its face that Union Producing Company and Magnolia Petroleum Company are in possession of the leased premises, operating two wells drilled on the premises and allegedly producing oil and gas therefrom on which royalties are being paid plaintiffs as their interests appear; and

(b) That the Court erred in not holding that since plaintiffs' petition in this case shows alleged partition by the heirs of the grantor in the suit contract subsequent to the date thereof, and the grant sued upon expressly stipulates against enlargement of the grantee's duty or obligation upon a partition, no decree could be entered requiring any drilling operations by defendants or either of them because of separate ownership by the plaintiffs of separate tracts in varying proportions out of the premises covered by this suit contract.

Conclusion

WHEREFORE, premises considered, it is with all respect submitted that this Honorable Court is in error in its decision and holding in this cause whereupon defendants appellees pray that the Court grant them a rehearing in this cause and that upon such rehearing, the decision and judgment of April 17th, 1941, be set aside and the judgment of the court below be in all things affirmed, and alternatively, if this Honorable Court still is of the opinion that the judgment of the court below should be reversed, that the decision and judgment of April 17th, 1941, be modified and amended and corrected so as to strike therefrom the instructions contained in the last paragraph of the opinion and decision to the District Court to frame a final decree upon the merits, and instead thereof the cause be remanded in that event to the District

Court for determination on motions for bills of particulars and motions to strike and thereafter, after answer filed, for disposition by trial upon the merits.

Respectfully,

WALACE HAWKINS,
EARL A. BROWN,
J. G. STRONG,
HUGH CARNEY,
THOMAS FLETCHER,

By Thomas Fletcher
Attorneys for Petitioners,
MAGNOLIA PETROLEUM COMPANY,
AND UNION PRODUCING COMPANY,
APPELLEES

Of Counsel:

LONG & STRONG,
CARNEY & CARNEY,
VINSON, ELKINS,
WEEMS & FRANCIS

We hereby certify on our honor that we consider each point made in the above petition to be well taken and that each is seriously and respectfully presented as meritorious. We further certify that Thomas Fletcher, attorney of record for the Appellee, Union Producing Company, is authorized to subscribe the names of the attorneys executing this certificate to such certificate.

WALACE HAWKINS,
EARL A. BROWN,
J. G. STRONG,
HUGH CARNEY

By Thomas Fletcher
Thomas Fletcher

ORDER DENYING REHEARING

Extract from the Minutes of May 10th, 1941

No. 9501

EDWIN S. HULL, et al.,

versus

MAGNOLIA PETROLEUM COMPANY, et al.

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 9501

EDWIN S. HULL, et al., Appellants,

vs.

MAGNOLIA PETROLEUM COMPANY, et al., Appellees

Appeal from the District Court of the United States for the Eastern District of Texas

Motion of Appellees for Stay of Mandate

MOTION AND ORDER STAYING MANDATE—Filed May 22, 1941

Come now Magnolia Petroleum Company and Union Producing Company, appellees, and move the court to stay the issuance of the mandate in this cause, and in the event said mandate has been issued prior to the filing of this motion, to recall it and hold the issuance of the same in abeyance, without bond, for the reason that appellees desire to present an application for writ of certiorari to the Supreme Court of the United States, and will present such application within the period provided by statute.

Appellees would further show that they intend to prosecute such application for certiorari without delay, and to

that end have already directed the clerk of this Court to prepare a certified transcript of the record to accompany such application.

In explanation of the failure to file this motion within the period of ten days following the overruling of their petition for rehearing, appellees would show that Thomas Fletcher has been directing counsel in this case during its pendency in this Court; that the said Thomas Fletcher has been absent from his office in Houston, Texas, continuously since the 5th day of April, 1941, engaged in the trial of causes which have consumed his entire time, and that by reason thereof he has been deprived of the opportunity of filing and presenting this motion at an earlier date.

Wherefore, appellees pray that the issuance of the mandate be stayed, or, if already issued, that it be recalled and stayed for such period as will enable appellees to present their application for certiorari to the Supreme Court of the United States and thereafter until such application is acted upon by the Supreme Court, and in the event a writ of certiorari should be granted by the Supreme Court, then until final disposition of the cause.

Wallace Hawkins, Earl A. Brown, J. G. Strong, Hugh Carney, Thomas Fletcher, by Earl A. Brown, Attorneys for Appellees, Magnolia Petroleum Company and Union Producing Company.

Of Counsel: Long & Strong, Carthage, Texas; Carney & Carney, Atlanta, Texas; Vinson, Elkins, Weems & Francis, Houston, Texas.

UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH DISTRICT

No. 9501

EDWIN S. HULL, et al., Appellants,

versus

MAGNOLIA PETROLEUM COMPANY, et al., Appellees

On Consideration of the Application of the Appellees in the above numbered and entitled cause for a stay of the

mandate of this court therein, to enable Appellees to apply for and to obtain a writ of certiorari from the Supreme Court of the United States, It Is Ordered that the issue of the mandate of this court in said cause be and the same is stayed for a period of thirty days; the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within thirty days from the date of this order there shall be filed with the clerk of this court the certificate of the clerk of the Supreme Court that certiorari petition, and record have been filed, and that due proof of service of notice thereof under Paragraph 3 of Rule 38 of the Supreme Court has been given. It is further ordered that the clerk shall issue the mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of thirty days from the date of this order, unless the above-mentioned certificate shall be filed with the clerk of this court within that time.

Done at New Orleans, La., this 22nd day of May, 1941.

(Signed) J. C. Hutcheson, Jr., United States Circuit Judge.

CLERK'S CERTIFICATE

UNITED STATES OF AMERICA:

UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

I, Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 48 to 82 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 9501, wherein Edwin S. Hull, et al., are appellants, and Magnolia Petroleum Company, et al., are appellees, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 47 are identical with the printed rec-

ord upon which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 22nd day of May, A. D. 1941.

Oakley F. Dodd, Clerk of the United States Circuit Court of Appeals, Fifth Circuit. (Seal.)

(4592)

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CHARLES ELMORE

IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1941

No. 181

MAGNOLIA PETROLEUM COMPANY AND UNION PRODUCING COMPANY, *Petitioners,*

v.

EDWIN S. HULL, JOE H. HULL, FANNABEL MYERS, JOINED PRO FORMA BY HER HUSBAND, C. T. MYERS, AND SADIE HULL BIEDERMAN, JOINED PRO FORMA BY HER HUSBAND, CHARLES E. BIEDERMAN, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

Of Counsel:
EARL A. BROWN,
HUGH CARNEY,
THOMAS FLETCHER

WALACE HAWKINS,
WM. A. VINSON,
Attorneys for Petitioners

ALPHA LAW BRIEF CO., HOUSTON

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IN THE

SUPREME COURT OF THE UNITED STATES

..... TERM, 1941

No.....

MAGNOLIA PETROLEUM COMPANY AND UNION PRODUCING COMPANY, *Petitioners,*

v.

EDWIN S. HULL, JOE H. HULL, FANNABEL MYERS, JOINED PRO FORMA BY HER HUSBAND, C. T. MYERS, AND SADIE HULL BIEDERMAN, JOINED PRO FORMA BY HER HUSBAND, CHARLES E. BIEDERMAN, *Respondents*

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

TO THIS HONORABLE COURT:

Your petitioners, MAGNOLIA PETROLEUM COMPANY and UNION PRODUCING COMPANY (appellees in the court below), respectfully present this petition for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit to review the decision and decree made and entered in said Circuit Court of Appeals on the 17th day of April, 1941 (Foster, Hutcheson and McCord, Circuit Judges, sit-

ting). Petition for rehearing was duly filed and denied by the court on May 9, 1941 (Tr. p. 79).

On application of petitioners the issuance of the mandate of the Circuit Court of Appeals was stayed in order to afford petitioners an opportunity to apply to the court for a writ of certiorari (Tr. p. 82).

Summary Statement of Matter Involved

This cause was originally filed on September 15, 1938, in the District Court of Panola County, Texas, by plaintiffs, who are respondents here, against the defendants, petitioners here, and was thereafter removed to the United States District Court for the Eastern District of Texas. Defendants filed a motion to dismiss in the United States District Court on the ground that the petition or complaint failed to state a claim or cause of action upon which relief could be granted. The motion was sustained by the United States District Court on January 4, 1940, and thereupon plaintiffs appealed to the Circuit Court of Appeals. The latter court reversed the trial court and rendered its decision on April 17, 1941. Petition for rehearing was overruled as stated above. The only issue before the court was as to the sufficiency of the petition, yet the Circuit Court of Appeals attempted to decide the case on the merits and directed the lower court to frame a conditional decree of cancellation of the defendants' oil and gas lease, as prayed for.

In their petition plaintiffs allege that they own certain lands in Panola County, Texas; that their ancestor, E. A. Hull, formerly owned said lands and on October 28, 1926, executed and delivered to Magnolia Petroleum Company an oil and gas lease on said lands; that thereafter Magnolia Petroleum Company assigned an interest in said lease to Union Producing Company; that the oil and gas lease, copy of which is attached as an exhibit to the petition, covers a tract of land recited

therein to contain 5371.6 acres but that in fact there are approximately 6000 acres in the tract.

Plaintiffs then alleged that the defendants drilled and completed two wells on the leased acreage which had produced a certain amount of oil and gas; that defendants refused to drill further; that the properties could be developed so as to produce large royalties; that it was the duty of the defendants to reasonably and diligently develop the said lands for oil and gas; that defendants failed and refused to develop the property as required; that a reasonable and proper development would require that a well be drilled upon each 50-acre tract; that the court should outline a drilling program and that the defendants should be ordered to drill an oil and gas well on at least every 50-acre tract. The relief prayed for was for judgment cancelling the oil and gas lease and for damages in the sum of $200,000 and alternatively for a decree outlining a drilling program and directing the defendants to comply therewith, in default of which cancellation was prayed.

The principal issue raised by the petition was whether or not implied covenants of development could be invoked under the terms of the oil and gas lease. Plaintiffs contend that implied covenants are applicable. Defendants contend that implied covenants are not applicable under this lease for the reason that the matter of development is covered by an express covenant of the lease and that implied covenants are inapplicable where the parties have expressly contracted on development. This issue revolves about the proper construction of the following clause in the lease:

> "It is expressly understood and agreed that grantee is not under obligation to nor compelled to commence or drill any well or wells or conduct any character of operations on the land herein described, during the term of this grant, save and except such as may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands" (Tr. pp. 13-14).

In its opinion the Circuit Court of Appeals failed to decide the proposition that an implied covenant must yield to an express covenant and that there can not be an express and an implied covenant covering the same duty at the same time. It held, however, that the words "term of this grant," as contained in the above quoted clause, had reference only to the first ten years of the term of the lease.

The habendum clause of the lease is in part as follows:

> "To Have and to Hold unto the said grantee, its successors and assigns, said minerals and rights, for the period of ten (10) years from date hereof, and for such other and further period of time as any of such minerals are produced from said land" (Tr. p. 11).

It is the contention of the petitioners that the words "term of this grant" refer to the entire period during which the lease is in force and not merely to the first ten years thereof; and that by reason thereof no development is ever required except such as may be reasonably necessary to protect the land from drainage from producing wells on adjoining lands; and that the District Court was right in so deciding on the motion to dismiss.

Defendants further contend that in any event the decision of the Circuit Court of Appeals should have been limited to vacating the order of dismissal entered by the District Court; that it should have remanded the cause to the lower court with directions to try the case on its merits. Instead, the Circuit Court of Appeals in its opinion directed "the District Judge to frame a decree that the lease shall be terminated, cancelled and held for naught except as to 20 acres around each well already drilled, unless defendants' lessees shall, within a reasonable time to be fixed by the court, commence thereafter diligently to prosecute drilling operations for the development of the lease for oil and gas." Defendants contend that even in the event implied covenants should be applicable,

it would require evidence and a trial on the merits in order for a court to determine whether or not such covenants had been breached, and that, manifestly, a court could not hold that such covenants had been violated when it had nothing before it except the plaintiffs' petition alleging violation.

Jurisdiction

This petition for writ of certiorari is prosecuted pursuant to the provisions of Section 240 of the JUDICIAL CODE (Title 28, Section 347 U.S. Code) and Rule 38 of the REVISED RULES OF THE SUPREME COURT OF THE UNITED STATES, adopted February 13, 1939 and amended March 25, 1940 and October 21, 1940, providing for review on writ of certiorari of decisions of the Circuit Courts of Appeal.

Petitioners would further show that the Circuit Court of Appeals has rendered its decisions herein on an important question of local law in a way which conflicts with the applicable local decisions, that is, the decisions of the appellate courts of the State of Texas which are controlling on the issues; and also has decided a question of general law in conflict with the weight of authority. Section 4(b) REVISED RULES OF THE SUPREME COURT, supra; ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S 64; 58 Sup. Ct. Rptr. 817.

Petitioners further contend that the decision of the Circuit Court of Appeals is violative of the FEDERAL RULES OF CIVIL PROCEDURE and particularly Rule 12, and decisions of this court and other federal courts, in that petitioners have been denied the right of a trial of this case on the merits; and that the rights of defendants have been adjudicated solely on the allegations of plaintiffs' petition. Petitioners further contend that reversing the lower court's ruling on a motion to dismiss should have been followed only by a direction that the lower court proceed to a trial of the case. Denial to petitioners of a right of trial on the merits is so great a departure from the

accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. Section 5(b), Rule 38, REVISED RULES OF THE SUPREME COURT, Fourteenth Amendment to Constitution of the United States.

Questions Presented

The following are the issues presented by this application:

(1) The Circuit Court of Appeals erred in directing the lower court to decree a conditional cancellation of defendants' lease, because the only issue before it was as to the sufficiency of the complaint in stating a claim upon which relief could be based.

(2) The Circuit Court of Appeals erred in refusing to apply the rules of construction announced by the Supreme Court of Texas, holding that implied covenants of development in an oil and gas lease do not exist in the face of an express covenant on the subject of development.

(3) The Circuit Court of Appeals erred in refusing to follow the decisions of the appellate courts of Texas, and the weight of authority generally, in holding that the phrase "term of this grant" as used in paragraph Third of the lease under construction (Tr. pp. 13-14) applied only to the fixed or ten-year period included in the term stated in the habendum clause (Tr. p. 11), and in not holding that it applied to the entire term ("ten (10) years from the date hereof *and* for such other and further period of time as any of such minerals are produced from said land").

Reasons Relied on For the Allowance of the Writ

The following reasons for allowance of the writ apply to each of the three questions presented above in their order:

(1) Defendants, believing that the plaintiffs' petition failed

to state a claim upon which relief could be granted, filed their motion to dismiss. The District Court sustained the motion. Plaintiffs appealed from the order of dismissal. There was no issue before the court other than whether the motion should have been sustained. No responsive pleading had been filed. No trial had been held. The only decision the Circuit Court was authorized to render, if it held the lower court's judgment erroneous, was one that should sustain the sufficiency of the petition, and the cause should have then been remanded with instructions to permit a trial on the merits. This the Circuit Court refused to do. Without a trial, and absent one scintilla of evidence in support of the plaintiffs' allegations, the court decreed cancellation of the defendants' lease. No authority for such arbitrary action was announced. Petition for rehearing was filed and an appeal was made for a modification of the decision to permit a trial on the merits and require the plaintiffs to prove the allegations of the petition. This was overruled without comment.

It is elementary that a defendant has the right to test the sufficiency of a plaintiff's petition with a motion or demurrer. An order of court thereon is an appealable order. The decision on such appeal is limited to the question raised, i. e., does the petition state a cause of action. A decision which goes further and attempts to extinguish the rights of a defendant, without permitting him a hearing on the issues, violates the 14th Amendment to the Constitution of the United States, Rule 38, Section 5(b), REVISED RULES OF THE SUPREME COURT; RULE 12, FEDERAL RULES OF PROCEDURE, and rules of decision in many adjudicated cases, which will be cited in the brief which follows this application.

(2) The Supreme Court of Texas in the case of GULF PRODUCTION CO. v. KISHI, 129 Texas 487, 103 S.W. (2d) 965 (and in other cases) has held that where an oil and gas lease contains an express agreement between the parties thereto, on

the subject of development, implied covenants of development cannot be invoked. The lease in this case provided that the lessee was under no obligation to drill or conduct any character of operations on the leased premises during the term of the grant, save and except such as might be reasonably necessary to protect the land from drainage from producing wells on adjoining lands. Nevertheless, the Circuit Court of Appeals held that there were implied covenants of development which should be enforced, and decreed cancellation of the lease upon failure of the defendants to comply with such implied covenants. This holding was directly contrary to the Texas rule, and under the authority of ERIE RAILROAD COMPANY v. TOMPKINS, 304 U.S. 64 and RUHLIN v. NEW YORK LIFE INSURANCE COMPANY, 304 U.S. 202, should be reversed.

(3) The holding that the words "term of this grant" appearing in paragraph Third of the lease (Tr. pp. 13-14), applies only to the ten-year period of the term, instead of the entire term which runs for "the period of ten (10) years and for such other and further period of time as any of such minerals are produced from said land" (Tr. p. 11), is contrary to the rules of construction of the appellate courts of Texas, the weight of authority generally, and ordinary logical reasoning and construction. The "term" of the grant, when construed with reference to time, means the *duration* of the grant; and when given its ordinary legal significance includes "not only the *entire time* for which the lease runs, but the entire estate or interest conveyed by the lease" (emphasis ours). DAVIS v. VIDAL, 105 Texas 244, 151 S.W. 290. Further argument on this issue will appear in the ensuing brief.

WHEREFORE, petitioners, for the reasons heretofore given and hereafter argued in the brief in support of this petition for review, respectfully pray that this court issue a writ of certiorari directed to the United States Circuit Court of Appeals for the Fifth Circuit, requiring said court to certify and

send to this court a full and complete transcript of the record herein, bearing the Circuit Court of Appeals' docket number 9501, to the end that this case may be reviewed and decided by this court as provided by law; and that the judgment and decision of the Circuit Court of Appeals be reversed and the judgment of the District Court affirmed, and that your petitioners have such other and further relief in the premises as to this court may seem just and proper.

WALACE HAWKINS,
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Of Counsel:
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BRIEF IN SUPPORT OF FOREGOING PETITION FOR CERTIORARI

The following argument is offered on each of the three "questions presented" as set forth in the foregoing petition, in their order:

1. The Circuit Court of Appeals was without authority to grant the relief prayed by plaintiff without a hearing on the merits.

No trial was had in this case; there has never been a hearing on the merits. Plaintiffs filed their petition seeking cancellation of defendants' oil and gas lease and alleging as grounds therefor the violation of implied covenants of development. Attached to the petition as an exhibit was a copy of the oil and gas lease in question. The lease contained a provision that the grantee was not under obligation to drill any well or wells except such as might be reasonably necessary to protect the land from drainage from wells on adjoining lands. Defendants took the position that the effect of this express covenant was to abrogate the existence of implied covenants in the lease and accordingly filed a motion to dismiss. The lower court, after due consideration, sustained the motion to dismiss and plaintiffs appealed from the order of dismissal (Tr. 38-40).

The foregoing are all of the proceedings which were had in the trial court. The Circuit Court of Appeals in reversing the case should have remanded it for the purpose of permitting the defendants to traverse the allegations of the petition so that a hearing on the merits could follow. Instead, the Circuit Court of Appeals directed the lower court to enter a judgment granting the relief prayed for in the petition.

Such action was not only extraordinary but we say, with respect, that it was arbitrary. Plaintiffs were not entitled to recover by merely alleging breach of implied covenants. Such

allegations must be sustained by proof. Under the decisions of the courts of Texas, a plaintiff who claims that implied covenants in an oil and gas lease have been breached must prove (1) that the lessee has not used reasonable diligence in development, that is, such diligence as an ordinarily prudent and diligent operator would use, and (2) that such development would be profitable not only to the lessor but also to the lessee. RHOADS DRILLING COMPANY v. ALLRED, 123 Tex. 229, 70 S.W. (2d) 576; TEXAS PACIFIC COAL & OIL COMPANY v. BARKER, 117 Tex. 418, 6 S.W. (2d) 1031, 60 A.L.R. 936; FREEPORT SULPHUR COMPANY v. AMERICAN SULPHUR ROYALTY COMPANY OF TEXAS, 117 Tex. 439, 6 S.W. (2d) 1039, 60 A.L.R. 890; W. T. WAGGONER ESTATE v. SIGLER OIL COMPANY, 118 Tex. 509, 19 S.W. (2d) 27; COSDEN OIL COMPANY v. SCARBOROUGH (5 C.C.A.), 55 Fed. (2d) 634. In this case the Circuit Court of Appeals ignored the applicable rule and rendered a judgment of cancellation without any character of proof whatsoever.

It is the general rule that when a record is in such shape that the appellate court cannot in justice determine what final judgment should be rendered the case will be remanded for such other proceedings as may be necessary in the trial court. PANAMA MAILS STEAMSHIP COMPANY v. VARGAS, 281 U.S. 670, 50 Sup. Ct. 448; BALLARD v. SEARLS, 130 U.S. 50, 9 Sup. Ct. 418; ROGERS v. THE ST. CHARLES, 19 How. (U.S.) 108, 15 L. Ed. 563; BINNEY v. CHESAPEAKE & O. CANAL CO., 8 Pet. (U.S.) 214, 8 L. Ed. 921, 3 Amer. Jur. 712.

This rule has a special application to a decision by an appellate court reversing an order sustaining a demurrer to a petition or a motion to dismiss on the ground that the petition fails to state a claim upon which relief can be granted. DUKE POWER COMPANY v. GREENWOOD COMPANY, 299 U.S. 259, 57 Sup. Ct. 202; MOLLAN v. TORRANCE, 9 Wheat. (U.S.)

537, 6 L. Ed. 154; STATE EX REL LA PRADE v. SMITH (Ariz.), 31 Pac. (2d) 102, 92 A.L.R. 173; MIDLAND SAVINGS & LOAN COMPANY v. TRADESMENS NATIONAL BANK (10 C.C.A.), 57 Fed. (2d) 686, certiorari denied, 287 U.S. 615; WILLIAM J. FRIDAY & COMPANY v. UNITED STATES (3 C.C.A.), 61 Fed. (2d) 370; U. S. v. REVERE COPPER & BRASS COMPANY (D.C. N.Y.), 28 Fed. Sup. 277; POLK COMPANY v. GLOVER, 305 U.S. 5, 59 Sup. Ct. 15.

An unusually clear statement of the duty which devolves upon an appellate court in cases of this character is stated in the opinion in the case of WILLIAM J. FRIDAY & COMPANY v. UNITED STATES, supra. There the court said:

> "As a matter of practice we are at a loss to see how the plaintiff would have been entitled to a judgment on the facts if the court had overruled the government's demurrer as we now hold it should have done. At common law, or at any other law with which we are familiar, the action of a court in overruling or sustaining a general demurrer to a petition or narr. is a finding, on averred facts admitted, that the plaintiff has or has not a good cause of action. If the demurrer be sustained, the judgment for the defendant is, in most jurisdictions, either final or respondeat ouster at the election of the plaintiff. If respondeat ouster, the plaintiff may, as under the Pennsylvania rule, amend and go to trial. If final, it is conclusive upon both parties, but an appeal lies, as in this case. *If on the plaintiff's appeal the judgment on demurrer be reversed, it leaves the case as before demurrer or as though the demurrer had been overruled, and leaves it open to trial (after traverse) on the unaffected pleading, the averments of which, of course, must be proved before verdict.* True, all facts well pleaded are admitted by the demurrer but this admission is only for purposes of demurrer. It is not conclusive of the case; therefore it does not authorize the trial court, on overruling the defendants' demurrer, to enter judgment for the plaintiff; *nor does it authorize this court in reversing a final*

judgment sustaining the defendant's demurrer to enter (or direct) judgment for the plaintiff in the nature of a judgment non obstante." (Emphasis ours.)

This court has determined that the entry of a final judgment in such a situation is erroneous in the case of POLK COMPANY v. GLOVER, 305 U.S. 5, 59 Sup. Ct. 15, 83 L. Ed. 6. Plaintiffs filed suit to challenge the constitutionality of a Florida statute covering the canning and labeling and sale of citrus fruit juices. Defendants, including the Florida Citrus Commission which intervened, filed answers and also filed motions to dismiss the bill of complaint upon the ground it failed to state a cause of action. A three-judge court was empaneled. On the application for interlocutory injunction the parties filed affidavits setting forth their respective contentions. At the hearing the three-judge court also heard the motions to dismiss for failure to state a cause of action. The injunction was denied, the motion to dismiss the bill was granted, and final judgment was entered accordingly, 22 Fed. Supp. 575. On direct appeal the Supreme Court held that the lower court erred in sustaining the motion, and in a per curiam opinion said:

> "We are of the opinion that the District Court erred in dismissing the bill of complaint. Plaintiffs did not submit the case to be decided upon the merits upon the bill, answers and affidavits. Defendants' motion to dismiss, like the demurrer for which it is a substitute (Equity Rule 29) was addressed to the sufficiency of the allegations of the bill. For the purpose of that motion, the facts set forth in the bill stood admitted. For the purpose of that motion, the court was confined to the bill and was not at liberty to consider the affidavits or the other evidence produced upon the application for an interlocutory injunction. But the findings of the court indicate that that evidence, in part at least, underlay the final decree it entered.

"We think that the facts alleged in the bill were sufficient to entitle the plaintiffs to an opportunity to prove their case, if they could, and that the court should not have undertaken to dispose of the constitutional issues (as to which we intimate no opinion) in advance of that opportunity."

Rule 12 of the FEDERAL RULES OF CIVIL PROCEDURE expressly authorizes the filing of a motion to dismiss on the ground that the plaintiff's pleading fails to state a claim upon which relief can be granted. Subdivision (d) of the rule provides that such motion shall be heard and determined before trial. It is an elementary rule that a defendant may in good faith test the sufficiency of a plaintiff's petition to state a cause of action if he acts in good faith. The FEDERAL RULES OF CIVIL PROCEDURE are but confirmatory of this fundamental principle.

We contend that the action of the trial court in sustaining the motion to dismiss should have been affirmed and our argument hereinafter is directed to this proposition, but in the event this court should find that the motion to dismiss was not well taken, nevertheless defendants are entitled to have the cause remanded for trial and the plaintiffs required to establish the allegations of their petition under the applicable rules.

2. The parties to the lease having expressly contracted upon the subject matter of development, implied covenants of development are not applicable.

In this case the parties, for a valuable consideration paid by grantees at the time of the execution and delivery of the lease, have expressly contracted that the grantee was not under any obligation nor compelled either to commence or drill any well or wells, or conduct any character of operations during the term of the grant, save and except such as

may be reasonably necessary to protect said land from drainage from producing wells on adjoining lands. The petition does not allege that there is any well or wells on adjoining lands draining the premises. Defendants contend, therefore, that plaintiffs are bound by this express covenant in the lease and cannot invoke implied covenants.

Under the settled law of the State of Texas in such cases, it is held that the express stipulation upon the subject matter of development, as here, prevents the existence of any implied covenant.

Cowden v. Broderick & Calvert, 131 Tex. 434, 114 S.W. (2d) 1166, affirming El Paso Court of Civil Appeals, 108 S.W. (2d) 562;
Gulf Production Company v. Kishi, 129 Tex. 487, 103 S.W. (2d) 965;
Gulf Production Company v. Kishi (T.C.A.), 105 S.W. (2d) 733;
Ralph v. Magnolia Petroleum Company, et al. (writ of error refused by the Supreme Court of Texas), 95 S.W. (2d) 222;
Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 19 S.W. (2d) 27;
Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W. (2d) 1039;
Burt v. Dearsom, 227 S.W. 354;
O'Neil v. Sun Oil Co. (writ of error refused), 123 S.W. 172;
Stanolind Oil & Gas Co. v. Christian (writ of error refused), 83 S.W. (2d) 408;
Lucy v. Dedman (writ dismissed for want of jurisdiction), 21 S.W. (2d) 546;
Bennett v. Giles, 12 S.W. (2d) 843.

This rule is also of universal application. As said in 6 R. C. L., page 589:

> "As in physics, two solid bodies cannot occupy the same space at the same time, so in law and common

> sense there cannot be an express and an implied contract for the same thing existing at the same time. This is an axiomatic truth. It is only when parties do not expressly agree that the law interposes and raises a promise."

Where an oil and gas lease is *silent* on the matter of development, there exists an implied covenant on the part of the lessee after discovery of oil and gas to continue exploration of the premises with reasonable diligence. W. T. WAGGONER ESTATE v. SIGLER OIL COMPANY, supra. But where the parties have expressly contracted as to the extent of development required, implied covenants do not form any part of the agreement, id.

In the case of GULF PRODUCTION COMPANY v. KISHI, supra, the Supreme Court of Texas said:

> "It is our opinion that the parties expressed, in the third paragraph of the first lease and in the fourteenth paragraph of the second lease, their agreements and intentions as to the number of wells required to be drilled by the lessee in the development of the premises covered by the two leases and as to the time when the wells should be drilled; in other words, that these two paragraphs contain the agreements of the parties upon the subject of development and the subject of diligence of development. This being true, there is no necessity for the implication of a covenant for development with reasonable diligence. To imply such covenant would be to make an agreement for the parties upon a subject about which they have in their written contracts expressly agreed."

Basing its opinion in the KISHI case upon an analysis of its opinion in the prior case of FREEPORT SULPHUR COMPANY v. AMERICAN SULPHUR ROYALTY COMPANY, supra, the Supreme Court in the KISHI case then said:

> "So here, if it be conceded that the drilling of the

fifteen wells on the one tract and the six wells on the other tract did not constitute reasonable development of all of the leased land, still there was no implied obligation for further development, because by the terms of the leases the parties *expressly stipulated upon the subject of development.* They deemed it advisable to set out in the leases the number of wells required to be drilled in the development of the property after the discovery of oil instead of leaving that matter to implication and to ultimate decision by a court or jury. This having been done, the obligations with respect to development imposed by the leases are to be determined by the express stipulations of the leases. For other authorities supporting the conclusion expressed see: Stanolind Oil & Gas Co. v. Christian (Tex. Civ. App.), 83 S.W. (2d) 408, 410 (application for writ of error refused); Stoddard v. Emery, 128 Pa. 436, 18 A. 339; Becker v. Submarine Oil Company, 55 Cal. App. 698, 204 P. 245; Harris v. Ohio Oil Company, 57 Ohio St. 118, 48 N.E. 502, 505; Merrill's Covenants Implied in Oil and Gas Leases, Para. 43, p. 122; Mills and Willingham's Law of Oil and Gas, Para. 108, p. 154; Summers' Oil and Gas, Para. 129, p. 414; 12 Tex. Jur., Para. 7, p. 13; 7 R. C. L., Para. 10, 11, p. 1093." (Italics ours.)

In the case of COWDEN v. BRODERICK & CALVERT, supra, the Supreme Court of Texas in a similar case said:

"The implied obligation to develop with reasonable diligence would have arisen after the discovery of oil in paying quantities in the first well if the parties to the lease had not contracted with respect to the development of the leased premises. Freeport Sulphur Co. v. American Sulphur Royalty Co., 117 Tex. 439, 6 S.W. (2d) 1039, 60 A.L.R. 890; Gulf Production v. Kishi, 129 Tex. —, 103 S.W. (2d) 965. The lease is not silent on the *subject* of development. It requires the lessee in the event of production on adjoining land to drill proper and necessary offsets and then provides: 'Lessor agrees that all other de-

velopment shall be at the discretion of the lessee.' The judgment on discretion of the lessee exercised in good faith is not the same measure for the lessee's obligation in the matter of development as the reasonable development required by the implied covenant which arises in the absence of express stipulation as to development. Texas Pacific Coal & Oil Co. v. Barker, 117 Tex. 418, 432, 6 S.W. (2d) 1031, 60 A.L.R. 936." (Italics ours.)

Measured by the rule of decision announced by the Supreme Court of Texas, we submit that the attempt of the plaintiffs herein to invoke implied covenants of development, in the face of the express covenant in the lease on this subject, cannot be sustained.

3. The Circuit Court of Appeals erred in holding that the word "term" as used in Paragraph Third of the grant refers only to the fixed or ten-year term and not to the whole term, including both the fixed period of ten years and the extension thereof by development.

Paragraph Third of the lease provides that no development of any character is required by the lessee

> "during the term of this grant save and except such as may be reasonably necessary to protect said land from drainage," etc.

For the meaning of the words "term of this grant" we look to the habendum clause of the lease which states the term as

> "the period of ten (10) years from the date hereof, and for such other and further period of time as any of such minerals are produced from said land;"

In its opinion (Tr. 49-55) the Circuit Court of Appeals

holds that the construction of the word "term" as used in the third paragraph applies only to the fixed period of ten years and not to the development period, stating that any other meaning would be "absolutely self-contradictory" and the reasons therefor are stated to be that "it would have the lease say in Paragraph (3) that drilling was not required during either the term or its extension, and in the second paragraph that diligent drilling was essential to the extension of the term." We submit that the Circuit Court of Appeals has misconstrued the meaning and the relationship of these two clauses. The term of the oil and gas lease would expire at the end of ten years if there was no *production* (subject to the other conditions providing for the extension of the ten-year period to permit completion of development operations begun during the ten-year period). If the lease was producing at the end of the ten years, then, as far as the term clause is concerned, the lease would continue in force so long as production was secured, whether from one well or a number of wells. Paragraph Third deals with the development obligations. Its purpose is to limit the obligation of the lessee as to the extent of development, but it does not affect the term of the lease. A violation of the development obligation of a lessee would not necessarily terminate the lease. It might result in a judgment for damages for breach of a covenant, or perhaps, in extreme cases, a cancellation of undeveloped portions of the lease, but the *term* of the lease would remain unimpaired and would still be effective as to that portion of the lease upon which production was secured and on which the development obligation had been satisfied.

In Texas an oil and gas lease is held to vest in the lessee a determinable fee in the oil and gas in place. TEXAS COMPANY v. DAUGHERTY, 107 Tex. 240, 176 S.W. 717, L.R.A. 1917F 989; STEPHENS COUNTY v. MID-KANSAS OIL & GAS COM-

PANY, 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; BROWN v. HUMBLE OIL & REFINING COMPANY, 126 Tex. 296, 83 S.W. (2d) 935, 99 A.L.R. 1107. A determinable fee is a fee simple estate subject to one or more limitations. In this case the limitations which would work a determination of the estate are (1) failure to obtain production or commence drilling before the expiration of the ten-year period; and (2) cessation of production after production had been obtained. The term of the grant is an entirety; it extends until the happening of one or more of the events stipulated to be a limitation on the estate of the grantee. Upon the happening of such an event, the grant *ipso facto* terminates.

Where an implied obligation of development exists, a breach of such obligation does not *ipso facto* terminate the lease. Affirmative steps must be taken by the lessor to secure relief against this obligation. If he is entitled to any remedy whatever, it is usually only after an adjudication by a court. Such an adjudication involves the presentation of evidence to the effect that the lessee has not developed the premises as an ordinarily prudent operator would do, and the issue will finally become a question of fact. There is no happening of an event which will *ipso facto* terminate the lease under the development obligation. It is this material difference between the term clause of the lease and the development clause which precludes one from modifying the other.

Furthermore, the development obligation does not even rise to the dignity of a condition subsequent. It is merely a covenant. A breach of the obligation will not work a forfeiture in the usual case, for the remedy for breach of implied covenant in Texas is an action for damages; and only in extreme cases, where the circumstances are extraordinary, where there can be no other adequate relief, will a court of equity entertain an action to cancel the lease in whole or in part. W. T. WAGGONER ESTATE v. SIGLER OIL COMPANY,

118 Tex. 509, 19 S.W. (2d) 27; T. P. COAL & OIL COMPANY v. BARKER (Tex. Sup.), 6 S.W. (2d) 1035; FREEPORT SULPHUR COMPANY v. AMERICAN SULPHUR ROYALTY COMPANY (Tex. Sup.), 6 S.W. (2d) 1045. Again, Paragraph Third of the lease stands by itself. There is not used therein one word which would indicate that its application should be confined to the ten-year period and not the full term of the lease. A splitting of the term and a limiting of the application to the first part of it would be an extraordinary construction of its meaning.

The Supreme Court of Texas in the KISHI case, supra, expressly refused to "split" the term of a lease to make way for the implied covenant. In that case the Supreme Court of Texas said:

> "Appellees' second proposition argues, in an effort to create a field for the operation of an implied covenant, that the express stipulations as to drilling wells do not state fully the duty of the lessee to develop but relate exclusively to development to be done within a specified period less than the entire term, and that there is an implied covenant for reasonable development during the remainder of the period for which the leases may endure. We find nothing in the leases suggesting that the express stipulations do not state fully the lessee's duty as to development. They specify the number of wells that must be drilled in the development of the property. The provisions that each well must be commenced within sixty or ninety days from the completion of the last prior well *were intended to accomplish the diligent drilling of the wells required and not to divide the terms of the leases into separate periods of development.* (Emphasis ours.)
>
> "Appellees' third proposition, that the stipulations for the drilling of the wells are conditions precedent to the acquisition by the lessee of new and enlarged estates as to which there are implied covenants for reasonable development, is untenable for the reason that it pre-

sents an erroneous conception of the nature of the estate created by the leases. It is settled in this state that an oil and gas lease, like those here under consideration, operates presently to invest the lessee with a determinable fee in the oil and gas in place. Texas Company v. Davis, 113 Tex. 321, 254 S.W. 304, 255 S.W. 601; Stephens County v. Mid-Kansas Oil & Gas Company, 113 Tex. 160, 254 S.W. 290, 29 A.L.R. 566; W. T. Waggoner Estate v. Sigler Oil Company, 118 Tex. 509, 19 S.W. (2d) 27; Sheffield v. Hogg, 124 Tex. 290, 77 S.W. (2d) 1021, 80 S.W. (2d) 741. The express provisions of the leases that the rights or estates of the lessee shall terminate on its failure to drill the wells are limitations upon the duration of the estates created by the leases. They are not conditions precedent to the acquisition of new or different estates. They are special limitations, by which, upon the happening of the contingency, the estate may come to an end before the regular end of the term. Tiffany's Real Property (2d ed.), Para. 59(b), p. 208; W. T. Waggoner Estate v. Sigler Oil Co., 118 Tex. 509, 519, 19 S.W. (2d) 27. No new estates arose or vested upon the completion of the wells stipulated to be drilled in the third paragraph of the first lease and in the fourteenth paragraph of the second lease. The drilling of the wells freed the estates created by the leases from the limitations prescribed in those paragraphs."

The ordinary meaning of the words "term of this grant" would be such period of time as the determinable fee would extend, that is, until the happening of one of the events named in the term clause which would terminate the grant. Paragraph Third does not have reference to any of these events. It simply provides for a modification of a covenant of the lease.

Another reason announced by the Circuit Court of Appeals for its decision is that the Sixth Paragraph of the lease expressly recognizes the existence of implied covenants and, therefore, the waiver of the development obligation in Para-

graph Third must be held to apply only during the ten-year term or the Sixth Paragraph will be nullified. The court fails to take into consideration that there is more than one kind of an implied covenant in a lease. Paragraph Third is directed only at the covenant requiring reasonable development, sometimes called "continuous" development and which, in effect, requires a lessee to continue development on the premises until a sufficient number of wells have been drilled to test the premises. In addition to the covenant of "reasonable development," there is also the covenant to protect against drainage on adjoining lands which "is a distinct obligation from the obligation imposed by the implied covenant to develop the property." STANOLIND OIL & GAS COMPANY v. CHRISTIAN (Tex. Civ. App.), 83 S.W. (2d) 408; UNITED NORTH AND SOUTH OIL COMPANY v. MEREDITH, 258 S.W. 550, 272 S.W. 124; POWELL v. DANCIGER OIL & REFINING COMPANY OF TEXAS (Tex. Civ. App.), 134 S.W. (2d) 493. There is also the covenant to use due care in operating and developing the property. HUMPHREYS OIL COMPANY v. TATUM (5 C.C.A.), 26 Fed. (2d) 882; MON-TEX CORPORATION v. POTEET, 118 Tex. 546, 19 S.W. (2d) 32. Thus, when it is taken into consideration that in addition to the obligation of reasonable development there are other covenants which may be implied in an oil and gas lease, Paragraphs Third and Sixth can both be given effect without conflict and without producing an illogical result.

Finally, the ordinary accepted meaning of the word "term" as used in legal authorities generally is at variance with the construction placed upon it by the Circuit Court of Appeals. In WEBSTER'S UNABRIDGED DICTIONARY the word "term" is shown to be synonymous with "duration" and "tenure."

BOUVIER'S LAW DICTIONARY, UNABRIDGED (Rawle's Third Revision), defines "term" as follows:

"The limitation of an estate: as a term for years, and

the like. The word *term* does not merely signify the time specified in the lease, but the estate, also, and interest that passes by the lease: and therefore the *term* may expire during the continuance of the time: as by surrender, forfeiture, and the like."

" 'Term' signifies not only the limitation of time, or period granted to the lessee for occupation of the premises, but it also includes the estate and interest in the land that pass during such period." (BARNES v. STANDARD OIL CO. OF CAL. (Wash.), 9 Pac. (2d) 1095, 1099).

Indeed the Supreme Court of Texas, in addition to its holding in the KISHI case, earlier fixed the question of what the "term" of a lease is in DAVIS v. VIDAL, 105 Tex. 244, 151 S.W. 290. The question was whether an instrument was an assignment of a lease, or was merely a subleasing. It became necessary, therefore, to determine precisely what the *term* of the lease was, for if the full term were transferred it was calld an assignment. Said JUDGE DIBRELL:

"It will be observed that, in stating the general rule as to what constitutes an assignment of a lease as distinguished from a sublease, the requirement is that the instrument must convey the whole *term*, leaving no interest or reversionary interest in the grantor.

"By the word 'term,' as used in the statement of this principle of law, is meant something more than the mere *time* for which the lease is given, and the instrument must convey not only the entire time for which the lease runs, but the entire estate or interest conveyed by the lease. Mr. Blackstone in his Commentaries (book 2, p. 144), in commenting on the significance of the word 'term,' when used in leases, says: 'Thus the word, *term*, does not merely signify the time specified in the lease, but the estate also and interest that passes by the lease; and therefore the *term* may expire, during the continuance of the *time*, as by surrender, forfeiture, and the like.' The meaning of the word 'term' as defined by Blackstone above, was adopted by the Supreme Court of

Massachusetts in the case of Dunlap v. Bullard, 131 Mass. 162, and by a number of text-writers on the subject of assignments and subleases." (Italics by the court.)

The principle is the same as to this grant or an oil, gas and mineral lease. The rule finds universal application in the United States. See:

Sanderson v. City of Scranton, 105 Pac. 469, 472;
Johnson v. Moxley (Ala.), 113 So. 651, 654;
Chicago Attachment Co. v. Davis Sewing Machine Co. (Ill.), 25 N.E. 669, 670;
Curry v. Bacharach Quality Shops, 117 Atl. 435, 438, 271 Pa. 364;
Hurd v. Whitsett, 4 Colo. 77, 84;
Gay Mfg. Co. v. Hobbs, 38 S.E. 26, 128 N.C. 46;
Austin v. Huntsville Coal & Mining Co., 72 Mo. 535, 37 Am. Rep. 446;
Delaware L. & W. R. Co. v. Sanderson, 1 Atl. 394, 109 Pa. 583;
Weander v. Claussen Brewing Ass'n, 42 Wash. 226, 84 Pac. 735, 736;
Taylor v. Terry, 71 Cal. 46, 11 Pac. 813;
Cochran v. Canty, 176 Iowa 713, 158 N.W. 559, 560;
Key v. Swanson, 113 Okla. 287, 241 Pac. 490, 492;
Rooney v. City of Omaha, 105 Neb. 447, 181 N.W. 143;
City Trust Co. of Newark v. Cohen (Court of Errors and Appeals, N. J., 1921), 112 Atl. 825, 95 N.J.L. 425;
Summers on Oil and Gas (Perm. Ed.), pages 103 to 173.

We submit that both under the authorities cited and the ordinary rules of construction the words "term of this grant" refer to the entire term and not to only the first portion thereof.

Conclusion

WHEREFORE, petitioners respectfully submit that their petition for certiorari should be granted, and that upon con-

sideration of the case the decision of the Circuit Court of Appeals should be reversed and that of the District Court affirmed.

Respectfully submitted,

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No. 181. MAGNOLIA PETROLEUM CO. ET AL. *v.* HULL ET AL. On petition for writ of certiorari to the Circuit

Court of Appeals for the Fifth Circuit. October 13, 1941. *Per Curiam:* The petition for writ of certiorari is granted. The judgment is reversed and the cause remanded to the District Court to permit trial of the issues raised by petitioners' answer and for further proceedings. *Messrs. Walace Hawkins, Wm. A. Vinson,* and *Hugh Carney* for petitioners. Reported below: 119 F. 2d 123.